(20,803.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 139.

BROWN-FORMAN COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 7, 1908.

1 THE COMMONWEALTH OF KENTUCKY:

Pleas before the Honorable the Court of Appeals, at the Capitol, at Frankfort, on the 19th Day of April, 1907.

BROWN-FOREMAN COMPANY, Appellant,
vs.
THE COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Franklin Circuit Court.

Be it remembered that on the 9th day of January, 1907, the appellant by its attorney filed in the office of the Clerk of the Court of Appeals a transcript of the record, and which is in words and figures as follows:

2 Pleas before the Hon. Robert L. Stout, Judge of the Franklin Circuit Court, in the case wherein the Commonwealth of Kentucky was plaintiff and Brown-Foreman Company was defendant.

Franklin Circuit Court.

Filed Sept. 18, 1906.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
BROWN-FOREMAN COMPANY, Defendants.

Petition.

The plaintiff, the Commonwealth of Kentucky, says that the defendant Brown-Foreman Company is a corporation doing business in this State, and engaged in the business or occupation of compounding, rectifying, adulterating or blending distilled spirits, known and designated as single stamp spirits, and was so engaged in June, 1906, and prior thereto, and by reason of such business and occupation and in compliance with the law, did report the number of wine gallons of spirits compounded, rectified, adulterated or blended by
3 said corporation from the time said law went into effect, to-wit June 25, 1906, to and including June 30, 1906, the end of the fiscal year.

Said report made by the defendant and filed with the Auditor of Public Accounts of date June —, 1906, shows that it had compounded, rectified, adulterated or blended distilled spirits from what is known and designated single stamp spirits, during that period of time, 2795.64/00 wine gallons and paid thereon the taxes required by law, of one and one fourth cents per wine gallon, amounting to the sum of $34.94, and also reported at the same time,

that it had compounded, rectified, adulterated or blended distilled spirits from what is known and designated double stamp spirits, which plaintiff says is distilled spirits, during that period of time, seventeen thousand one hundred wine gallons, but failed and refused and still fails and refuses to pay the tax due thereon, which at the rate of one and one quarter cent on the wine gallon amounts
4 to two hundred and one dollars and twenty-five cents ($201.25).

Wherefore, the premises considered, plaintiff says the Brown-Foreman Company is indebted to the plaintiff, Commonwealth of Kentucky in the sum of $201.25 for taxes as aforesaid, which amount it is entitled to recover of the defendant, and for which sum it prays judgment against the defendant; for its costs herein expended, and for all proper relief.

N. B. HAYS, *Att'y Gen'l,*
JOHN W. RAY,
JAS. O. MORRIS,
C. H. MORRIS,
For Plaintiff.

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
5 *vs.*
BROWN-FOREMAN COMPANY, Defendant.

Demurrer.

The defendant, Brown-Foreman Company demurs to the petition because it does not state facts sufficient to constitute a cause of action.

W. M. HOUGH,
W. O. BRADLEY,
KOHN, BAIRD & SPINDLE,
T. H. PAYNTER,
Att'ys for Defendant.

6 Franklin Circuit Court.

Sept. 29, 1906.

COMMONWEALTH OF KY.
vs.
BROWN-FOREMAN COMPANY.

Came defendant by attorney and filed a demurrer to the petition herein and this cause is now submitted upon the demurrer.

Franklin Circuit Court.

Filed Sept. 29, 1906.

COMMONWEALTH OF KENTUCKY, *ex Rel.*, &C.,
vs.
BROWN-FOREMAN COMPANY.

Demurrer.

7 Comes now the defendant herein and demurs to the petition heretofore filed in this cause, and for ground of demurrer says:

1. That the petition does not state facts sufficient to constitute a cause of action, for the reason that the Act of the special session of the General Assembly of 1906, approved March 28th, 1906, does not provide for the payment of a license tax by one angeged in the business or occupation of compounding, rectifying, adulterating or blending distilled spirits known and designated as *double* stamp spirits, but only provides for the payment of a license tax from one engaged in the business or occupation of compounding, rectifying, adulterating or blending distilled spirits known and designated *as single* stamp spirits.

2. That the said Act of the special session of the General Assembly of 1906, approved March 28, 1906, is unconstitutional, inoperative and void, because;

8 (*a*) Said Act violates Sec. 51 of the Constitution of Kentucky, which provides that no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title;

(*b*) Said Act is violative of Sec. 171 of the Constitution of Kentucky, which provides that the tax shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax;

(*c*) Said Act is violative of Sec. 172 of the Constitution of Kentucky, which provides that all property shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale;

(*d*) Said Act is violative of Sec. 174 of the Constitution of Kentucky, which provides that all property shall be taxed in proportion to its value.

(*e*) Said Act is violative of Sec. 180 of the Constitution of Kentucky, which provides that every act enacted by the General
9 Assembly, levying a tax shall specify distinctly the purpose for which said tax is levied;

(*f*) Said Act is violative of Sec. 202 of the Constitution of Kentucky, which provides that no corporation organized outside the limits of this State shall be allowed to transact business within this State on more favorable conditions than are prescribed by law to

similar corporations organized under the laws of this Commonwealth.

3. That the said Act of the special session of the General Assembly of 1906, approved March 28, 1906, is violative of the Constitution of the United States, in that:

(*a*) It violates the Fourteenth Amendment to said Constitution, which provides that no State shall deny to any person within its jurisdiction the equal protection of its laws;

(*b*) It violates Sec. 8, Art. 1, of said Constitution, which gives Congress the exclusive right to regulate interstate commerce; and

10 (*c*) It violates the second clause of Sec. 10, Art. 1, of said Constitution, which prohibits any State from laying any impost upon an import.

T. H. PAYNTER.
W. O. BRADLEY.
DAVID W. BAIRD.
W. M. HOUGH.

Franklin Circuit Court.

Filed Sept. 29, 1906.

COMMONWEALTH OF KENTUCKY EX REL., &c., Plaintiff,
vs.
BROWN-FOREMAN COMPANY, Defendant.

Answer.

Comes now the defendant herein and for answer to plain-
11 tiff's petition admits that it is a corporation doing business in this State and engaged in the business or occupation of compounding, rectifying, adulterating or blending distilled spirits, known and designated as single stamp spirits, and was so engaged in June, 1906, and prior thereto.

Defendant alleges that by virtue of the system of marking and stamping distilled spirits under the United States Internal Revenue Laws, all distilled spirits in the United States are divided into two classes, respectively, to-wit: Distilled spirits known and designated as double stamp spirits, by reason of the fact that they carry two stamps under the internal revenue laws, and distilled spirits known and designated as single stamp spirits, by reason of the fact that they carry but a single stamp under internal revenue laws.

That distilled spirits known and designated as single stamp spirits are of two classes, to-wit: Those which carry a rectifier's stamp, which would indicate that there had been a mixing of distilled spirits, and those carrying a wholesale liquor dealers' stamp,
12 which does not indicate a mixing of distilled spirits, but only a transfer of packages.

Defendant alleges that in conformity with an Act of the special session of the General Assembly of Kentucky, of 1906, approved

March 28th 1906, it filed with the Auditor of Public Accounts notice of its intention to engage in such business, and upon blanks which were furnished by the Auditor it made due report of the number of wine gallons of distilled spirits known and designated as single stamp spirits which it had compounded, rectified, adulterated or blended during the period alleged in the petition, and, at the same time paid into the State treasury, through the Auditor, the amount of taxes due the State, as provided by said law, and at the rate of one and one quarter ($1\frac{1}{4}¢$) cent- per wine gallon upon such compounded, rectified, adulterated or blended distilled spirits.

Defendant alleges that at the same time, and upon the re-
13 quest of the Auditor for "other information" as contemplated by said law, it, in addition to reporting the number of gallons of distilled spirits known and designated as single stamp spirits which it had compounded, rectified, adulterated or blended as aforesaid, also reported that during the same period contemplated by the report, it had compounded, rectified, adulterated or blended from distilled spirits known and designated as double stamp spirits, but failed and refused, and still fails and refuses to pay any tax thereon, for the following reasons:

1. That the act of the General Assembly as aforesaid does not provide for the payment of a license tax by one engaged in the business or occupation of compounding, rectifying, adulterating or blending distilled spirits known and designated as double stamp spirits, but only provides for the payment of a license tax from one engaged in the business or occupation of compounding, rectifying, adulterating or blending distilled spirits, known and desig-
14 nated as single stamp spirits; and the law does not provide that the amount of tax to be paid therefor, is to be estimated upon the number of wine gallons of distilled spirits, known and designated as double stamp spirits which it shall compound, rectify, adulterate or blend as aforesaid, but upon the number of wine gallons of distilled spirits known and designated as single stamp spirits which it shall compound, rectify, adulterate or blend as aforesaid,

2. The act of the special session of the General Assembly of 1906, approved March 28th, 1906, is unconstitutional, inoperative and void, because:

(*a*) Said act violates Sec. 51 of the Constitution of Kentucky, which provides that no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title;

(*b*) Said act is violative of Sec. 171 of the Constitution of Kentucky, which provides that the tax shall be uniform upon
15 all property subject to taxation within the territorial limits of the authority levying the tax;

(*c*) Said act is violative of sec. 172 of the Constitution of Kentucky, which provides that all property shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale;

(*d*) Said act is violative of Sec. 174 of the Constitution of Ken-

tucky, which provides that all property shall be taxed in proportion to its value.

(*e*) Said act is violative of Sec. 180 of the Constitution of Kentucky, which provides that every act enacted by the General Assembly, levying a tax shall specify distinctly the purpose for which said tax is levied;

(*f*) Said act is violative of Sec. 202 of the Constitution of Kentucky, which provides that no corporation organized outside the limits of this State shall be allowed to transact business within this State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this Com-
16 monwealth,

3. Said act of the special session of the General Assembly of 1906, approved March 28, 1906, is violative of the Constitution of the United States, in that;

(*a*) It violates the Fourteenth Amendment to said Constitution, which provides that no State shall deny to any person within its jurisdiction the equal protection of its laws, or deprive any person of life, liberty or property without due process of law.

(*b*) It violates Sec. 8, Art. 1, of said Constitution, which gives Congress the exclusive right to regulate interstate commerce; and

(*c*) It violates the second clause of Sec. 10, Art. 1, of said Constitution, which prohibits any State from laying any impost upon an import.

Wherefore having fully answered, defendant prays to be dismissed with its costs.

W. O. BRADLEY,
DAVID W. BAIRD,
17 T. H. PAYNTER,
WARWICK M. HOUGH,
Atty's for Defendant.

Franklin Circuit Court.

Filed Sept. 29, 1906.

THE COMMONWEALTH OF KY.
vs.
BROWN-FOREMAN CO.

Demurrer.

Comes the plaintiff and demurs to the answer filed and for cause says that the same does not state facts sufficient to present a defense to this action, and upon this it prays the judgment of the Court.

N. B. HAYS,
Att'y Gen.
JNO. RAY AND
C. H. MORRIS,
Atty's.

18 Franklin Circuit Court.

Filed Sept. 29, 1906.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
BROWN-FOREMAN COMPANY, Defendant.

Judgment.

The defendant filed a General Demurrer to the petition and also filed an additional General Demurrer thereto, in which the reasons in support of it were specified. The case was submitted on these Demurrers and the Court having considered thereof overruled same. Thereupon, the defendant filed an Answer. The plaintiff filed a Demurrer to the Answer and the case was submitted on that Demurrer; and the Court after consideration, sustained the Demurrer to the Answer, to which ruling of the Court the defendant excepted.

The defendant refused to plead further, and the Court being of the opinion that the plaintiff was entitled to recover in the
19 action, it is adjudged: That the plaintiff, Commonwealth of Kentucky, recover of the defendant, Brown-Foreman Company, the sum of two hundred and one and twenty five hundredth-dollars, ($201.25), with interest thereon, from September 18, 1906, until paid, and the costs herein expended.

The defendants except to the judgment and pray an appeal to the Court of Appeals, which is granted.

20 Franklin Circuit Court.

Filed Sept. 29, 1906.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
against
BROWN-FOREMAN CO., Defendant.

Order for Schedule.

The Clerk is hereby directed to make a complete transcript of the record in the above case for use on appeal in Court of Appeals.

T. H. PAYNTER,
Att'y for Brown-Foreman Co.

21 STATE OF KENTUCKY, *County of Franklin, sct:*

I, Ben Marshall, Clerk of the Franklin Circuit Court, do hereby certify that the foregoing 20 pages and this page, contain a true and complete copy of the case wherein Commonwealth of Kentucky was plaintiff and Brown-Foreman Company, was defendant, as appears from the records and files of the Franklin Circuit Court.

Witness my hand as Clerk of the Court aforesaid, this 10th day of December, 1906.

BEN MARSHALL,
Clerk Franklin Circuit Court.

Clerk's fee for transcript, $4.35.

22 Be it remembered that on the 9th day of January 1907, at a Court of Appeals held at the Capitol at Frankfort the following order was entered:

BROWN-FOREMAN COMPANY
v.
COMMONWEALTH.

Franklin.

Came the parties by counsel and filed an agreement and on motion said case is ordered docketed for the present term, and advanced and set for oral argument on February 6th, 1907.

And afterwards at a Court of Appeals held at the Capitol at Frankfort on the 23rd day of January, 1907, the following order was entered, to-wit:

BROWN-FOREMAN COMPANY
v.
COMMONWEALTH.

Franklin.

Came parties by counsel, and on motion said case is reassigned for oral argument and set for February 28th, 1907.

23 And afterwards on the 28th day of Feb. 1907 at a Court of Appeals held at the Capitol at Frankfort the following order was entered, to-wit:

BROWN-FOREMAN COMPANY
v.
COMMONWEALTH.

Franklin.

This case coming on to be heard was argued by T. H. Paynter and W. M. Hough for appellant, and J. W. Ray and J. S. Morris for the appellee, and submitted.

And afterwards on the 19th day of April, 1907 at a Court of Appeals held at the Capitol at Frankfort, the following judgment was entered to-wit:

BROWN-FOREMAN COMPANY, Appellant,
vs.
THE COMMONWEALTH, Appellee.

Appeal from Franklin Circuit Court.

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed,
24 which is ordered certified to said Court (Whole Court sitting).

It is further considered that the appellee recover of the appellant its costs herein expended.

And on said date the Court delivered the following opinion:

25 Court of Appeals of Kentucky.

April 19, 1907 (to be reported).

BROWN-FOREMAN COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Franklin Circuit Court.

Opinion of the Court by Judge HOBSON:

At the last session of the General Assembly the following act was passed:

"An act relating to revenue and taxation, providing for license taxes on compounded, rectified, adulterated or blended distilled spirits, known and designated as single stamp spirits, and providing
26 penalties for violations of its provisions.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"SECTION 1. Every corporation, association, company, copartnership or individual engaged in this state in the business or occupation of compounding, rectifying, adulterating or blending distilled spirits, known and designated as single stamp spirits, shall pay to the Commonwealth of Kentucky a license tax of one and one-fourth cent upon every wine gallon of such compounded, rectified, blended or adulterated distilled spirits.

"SEC. 2. It shall be the duty of each corporation, association, company, copartnership or individual engaged in this state in the business or occupation of compounding, rectifying, adulterating or blending distilled spirits, known and designated as single stamp spirits, to make and deliver to the Auditor of Public Accounts, on the
27 thirtieth day of June, one thousand nine hundred and six (or within ten days thereafter), and at the end of each six

months thereafter, a report sworn to, upon blanks to be furnished by the Auditor, stating the name, place of business and the number of wine gallons of compounded, rectified, adulterated or blended distilled spirits, known and designated as single stamp spirits, made during the six months then ended, and such other information as the Auditor may require, and at the same time pay into the state treasury, through the Auditor, the amount of taxes due the state, as herein provided, imposed by the last preceding section.

"SEC. 3. Before any corporation, association, company, copartnership or individual shall engage in the business or occupation of compounding, rectifying, adulterating or blending, in this state, the Auditor of Public Accounts shall be given notice of the intention of such corporation, association, company, copartnership or in-
28 dividual to engage in such business occupation. The notice shall contain the name and place of residence of such corporation, association, company, copartnership or individual, and the approximate number of wine gallons of such compounded, rectified, adulterated or blended spirits the applicant contemplated making prior to the first date at which he is required to report the number of gallons made to the Auditor of Public Accounts under this act.

"SEC. 4. Upon receipt of such notice by the Auditor of Public Accounts, he shall issue to each appellant a certificate, showing that he has complied with this act. Any corporation, association, company, copartnership or individual, who shall engage in the business of compounding, rectifying, adulterating or blending distilled spirits, known and designated as single stamp spirits, without first receiving said certificate herein provided for from the Auditor of Public Accounts, shall be guilty of a misdemeanor and subject to in-
29 dictment in the Franklin circuit court, and fined any sum not less than five hundred dollars nor more than two thousand dollars.

"SEC. 5. Upon the payment of the license tax to the Treasurer through the Auditor of Public Accounts, as provided in this act, the Auditor of Public Accounts shall issue to such corporation, association, company, copartnership or individual authority to continue in the business or occupation of compounding, rectifying, adulterating or blending distilled spirits known and designated as single stamp spirits, if such authority is desired for six months or until the date provided in this act when reports are to be made.

"SEC. 6. Any compounder, rectifier, adulterator or blender liable for taxes imposed by this act, or embraced by its provisions, who shall fail or refuse to make and deliver to the Auditor of Public Accounts a sworn report, containing all the facts required to be reported, and pay the license tax as required by this act, shall be deemed
30 guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty nor more than one hundred dollars for each day of such failure or refusal, to be recovered by indictment in the Franklin circuit court, and shall forfeit his right to engage in said business in this State.

"SEC. 7. Any corporation, association, company, copartnership or individual who shall ship any compounded, rectified, blended or

adulterated distilled spirits, known and designated as single stamp spirits, into this state for the purpose of labeling, branding, marking or stamping the same as Kentucky whiskey, product or spirits, or which, before shipment into this State, shall have been, or may thereafter be, labeled, branded, marked or stamped as Kentucky whiskey, product or spirits, shall be deemed compounders, rectifiers, blenders or adulterators under the provisions of this act, and shall pay the license tax imposed herein on compounders, rectifiers, blenders or adulterators of such spirits in this State, and shall make the report required herein to the Auditor of Public Accounts.

"Any corporation, association, company, copartnership or individual who shall violate this section of this act shall be deemed guilty of a misdemeanor, and fined in any sum not less than five hundred nor more than one thousand dollars. Each shipment shall be deemed a separate offense. The Franklin circuit court shall have jurisdiction of all offenses committed under this act.

"SEC. 8. All laws or parts of laws in conflict with this act are hereby repealed."

See Acts 1906, p. 449.

On June 30, 1906, the Brown-Foreman Company filed a report with the Auditor showing that it had compounded or rectified distilled spirits, from what is known as "single stamp spirits," 2,795.64 wine gallons; also that it had compounded or rectified distilled spirits from what is known as "double stamp spirits," 17,100 wine gallons. It paid the tax of 1¼ cents on the 2,795.64 gallons made from the single stamp spirits, but declined to pay the tax on the 17,100 gallons made from the double stamp spirits. The Commonwealth brought this suit to recover the taxes, amounting to $201.25. The defendant filed a demurrer to the petition, and also filed an answer. In the answer it was averred that all distilled spirits in the United States are divided into two classes, and known as "double stamp spirits" from the fact that they carry two stamps under the internal revenue laws, and "single stamp spirits" by reason of the fact that they carry but a single stamp; that single stamp spirits are of two classes, those which carry a rectifier's stamp indicating that there has been a mixing of distilled spirits, and those carrying a wholesale liquor dealer's stamp, which does not indicate a mixing of distilled spirits, but only a transfer of packages. The court overruled the demurrer to the petition, and sustained the demurrer to the answer, and, the defendant failing to plead further, entered judgment in favor of the plaintiff. From this judgment the defendant appeals.

It is insisted for the appellant that the act is invalid under section 51 of the Constitution, which requires that an act shall relate to only one subject, and that this subject shall be expressed in the title. It is said that the purpose of the act, as shown by the title, is to impose a tax on rectified spirits, and not a license tax on the occupation. If the title of the act had stopped with the words "An act relating to revenue and taxation," it would have been sufficient under the rule repeatedly laid down by this court. Commonwealth *v.* Godshaw, 92 Ky. 435; Conly *v.* Commonwealth, 17 R. 678; Rosenham *v.* Com-

monwealth, 8 R. 579. The remainder of the title in no way
34 narrows the meaning of the words "An act relating to revenue and taxation." On the contrary, the remaining words of the title clearly show that the Legislature had in mind a license tax on compounded, rectified, adulterated, or blended distilled spirits. This court has steadily enforced the rule that section 51 of the Constitution should receive a reasonable, not a technical, construction, and no provision of a statute fairly within the purview of the subject expressed in the title shall be deemed within the constitutional inhibition. (Jacobs *v.* L. & N. R. R. Co., 10 Bush, 263; Allen *v.* Hall, 14 Bush, 85; Trustees of Augusta *v.* Maysville, etc. R. R. Co., 16 R. 890.)

It is also insisted for appellant that the act levies a property tax and that it is invalid under section 171 of the Constitution, for the reason that it is not uniform upon all property subject to taxation within the territorial limits of the authority levying the tax. It is insisted that rectified spirits, like other property, must be taxed ad valorem, and that the act imposes an additional tax upon this
35 class of property. The power to provide for taxation based on income, licenses or franchises is expressly reserved in section 174, which provides that all property shall be taxed in proportion to its value; and by section 181 the General Assembly is authorized to provide for the payment of license fees on trades and occupations, or a special or excise tax. In Strater Bros. Tobacco Co. *v.* Commonwealth, 117 Ky. 604, it was held that a license tax is valid, although the amount of it is made to depend upon the value of goods produced. In that case the manufacturer was required to pay on the manufactured product, for each factory, "one dollar on the marketable value of each one thousand dollars of such product," and it was insisted there, as here, that a tax upon property was levied. The court held otherwise. Among other things, it said: "The tax imposed is not levied upon property. It is is simply a license tax, as declared by the General Assembly in the act. The Constitution not only does not prohibit the imposition of such a tax, but
36 it expressly recognizes the right of the Legislature to impose it. It not only does so, but it authorizes it to be done in addition to an ad valorem tax. * * * The larger manufacturer is required to pay more than the smaller one, based upon the value of the product manufactured. If all manufacturers of tobacco, regardless of the manufactured product manufactured by each, had been made to pay the same license tax, then a more potential argument could be made against the validity of the law for the lack of uniformity and inequality of burden than has been made against the law here sought to be enforced. While this is true, we would not hold it sound. If we did, then it would logically follow that a license tax on retail liquor dealers would be invalid, because the one who sold a small quantity of liquor paid the same as the one who sold many times as much. This court has upheld ordinances imposing a license or occupation tax on liverymen based upon the number of vehicles employed in their business. Such taxes are
37 not based upon the value of the vehicles or the profit derived from their use, but upon the number employed."

We are unable to see any substantial difference between that act and the one now before us. A license tax is imposed. The amount of the license tax is determined by the amount of spirits produced. The tax is not upon the spirits. It is a license tax upon the business. To hold it a tax upon the property, we must disregard the word "license" in both the title and the body of the act. That a license tax was contemplated is also shown by section 3, which requires that notice shall be given to the Auditor, stating certain facts, before the business shall be engaged in; by section 4, that upon such notice the Auditor shall thereupon issue to each applicant a certificate showing that he has complied with the act; and by section 5, that upon the payment of the license tax to the Treasurer the Auditor shall
38 issue to such persons authority to continue in the business, if such authority is desired. Under the statute a man may not legally engage in the business without giving the notice and having the certificate from the Auditor. The payment of the tax at the times required by the statute is the condition upon which authority to continue in the business is made to depend. This is manifestly a tax on the business, and not upon the property. The amount of the tax is simply regulated by the amount of the product but it is a license tax upon the business. To hold otherwise would be to say that the Legislature cannot impose a graduated license tax based upon the amount of product manufactured. Section 7 also sustains this conclusion. That section makes it unlawful for any person to ship any rectified spirits into this State for the purpose of marking same as Kentucky whiskey, or which before shipment into the State shall have been so marked. All such shippers are to be treated as
39 rectifiers in this State. No tax is levied upon rectified whiskey brought into this State unless brought in as provided in section 7. The tax under this section is not laid as a burden upon the property but to prevent rectifying from being done out of the State and the goods sold as the product of this State without the payment of the rectifying tax. No tax is levied upon rectified whiskey in existence. The whole aim of the act is to tax the business of rectifying after it goes into effect.

It is further insisted for appellant that the act is in conflict with section 180 of the Constitution in this, that the act does not specify the purpose for which the tax is levied. The part of section 180 relied on is as follows:

"Every act enacted by the General Assembly, and every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax, shall specify distinctly
40 the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose."

The Constitution went into effect in the year 1891. Pursuant to its provisions a commission of learned lawyers was appointed to revise the statutes of the State so as to conform them to the provisions of the Constitution. Their revision was submitted to the first General Assembly which met after the adoption of the Constitution, which was composed of not a few members of the constitutional con-

vention and has since been known as the "Long Parliament," owing to the length of its sessions. In the revision of the laws relating to taxation as made by them, it appears that they understood section 180 of the Constitution not to refer to license taxes. At least, in the acts passed by them levying license taxes, the purpose for
41 which the tax is levied is not specified. Though the revenue laws of the State have been several times revised since 1891, in every revision the same course was followed. In none of the acts passed since the new Constitution levying license taxes has the purpose for which the tax is levied been specified. This co-temporaneous construction of the Constitution concurred in by so many legislatures ought not now to be lightly departed from. In addition to this, this Court has time and again enforced fines based on the failure to pay licenses under the statutes referred to, and while the point now made does not appear to have been presented in any of these cases, still, some effect must be given to the acquiescence of the bench and the bar in the legislative construction of the Constitution. Section 170 provides what property shall be exempt, section 171 for an annual tax uniform upon all property subject to taxation, section 172 for the assessment of property, section 174 for taxation of property in proportion to its value, and section 180 as to how taxes shall
42 be levied. Manifestly, section 174 does not apply to franchise taxes and that section 180 was not intended to apply to them is shown by section 181, which is in these words:

"The General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes. The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

43 The second clause of this section is the authority of the General Assembly for license taxes. The first clause of the section refers to other taxes for municipal purposes and the third clause to municipal license taxes, showing that the constitutional convention kept in mind that it had not in its previous provisions covered the subject of license taxes. We announced this conclusion in the recent case of Shugar *v.* Hamilton, 29 R., 127, and upon a reconsideration of the question we adhere to the rule then announced.

Lastly, it is insisted that the license tax is to be paid by the rectifier upon the amount of rectified spirits which he makes by blending distilled spirits known and designated as single stamp spirits but that he is not taxed at all on rectified spirits which he makes by using double stamp spirits.

The act was not aimed at the spirits used in rectifying. It levies a license tax upon the business. The thing in the mind of the
44 legislature was the business of rectifying and the license tax is regulated by the amount of the product. What the legis-

lature had in mind was the rectified product, not the character of spirits used in producing it. Omitting other words as shown by the title of the act it provides for a license tax on rectified distilled spirits. The first section of the act requires the payment of the license tax of one and one-fourth cent upon every wine gallon of rectified distilled spirits. The words "compounded, blended or adulterated" are simply used to make clearer the meaning. That this is the meaning is shown by section 3 which describes the business upon which the tax is levied as "the business or occupation of compounding, rectifying or blending in this State," and requires a statement of "the approximate number of wine gallons of such compounded, rectified or blended spirits the applicant contemplates making prior to the first date at which he is required to report." That this is the meaning of the act is also shown by section 7 punishing any
45 person "who shall ship any compounded, rectified, blended or adulterated spirits" into this State for the purpose of stamping same as Kentucky whiskey. It is a matter of common knowledge that a large part of the whiskey used in the United States is rectified; that is, that a barrel of whiskey as it comes out of the distillery is adulterated by the rectifiers so as to make five or six barrels of whiskey out of it, (See Taylor *v.* Taylor, 27 R., 628) and it is this business of multiplying the whiskey which is distilled that the legislature imposed the license tax upon.

The act is not in conflict with section 202 of the Constitution:

"No corporation organized outside the limits of this State shall be allowed to transact business within the State on more favor-
46 able conditions than are prescribed by law to similar corporations organized under the laws of this Commonwealth." (Sec. 202, Constitution.)

The license tax is imposed upon the occupation of rectifying in this State. A foreign corporation pursuing the business in this State must pay the tax no less than a home corporation doing the same business in the State. The home corporation engaged in the rectifying business not in Kentucky but elsewhere is no more liable to the tax than a foreign corporation engaged in the business in another State but not in Kentucky. The home corporation and the foreign corporation stand just alike under the statute. Both are liable to the tax if they engage in rectifying in the State and neither is liable if it does not so engage in the business. The legislature cannot regulate interstate commerce but may regulate the occupation of rectifying in this State, and to this end may
47 provide against rectified whiskey made elsewhere being brought here, branded as Kentucky whiskey and sold as such in the State. Section 7 of the act is a legislative exercise of the police power to protect the people of the State against deleterious compounds, to prevent shifts or devices to evade the tax, and to protect the manufacturers of the State against competition with rivals, who falsely mark their goods Kentucky whiskey to deceive purchasers.

The act is not in violation of the 14th amendment of the Constitution of the United States, or of any provision of that instrument.

Residents of the State and non-residents are treated just alike. resident of Kentucky may have his establishment outside of Ke tucky and be no more liable to the tax than the non-resident of t State following the same business in the same locality. No pers within the State is denied the equal protection of its laws. The ta is on the occupation and is imposed on all alike who are e
48 gaged in the occupation in the State.
Judgment affirmed.

T. H. Paynter, Kohn, Baird, Sloss & Kohn, W. M. Hough, W. Bradley, David W. Baird, for Appellant.
James S. Morris, N. B. Hays, Att'y Gen'l, C. H. Morris, J. W Ray, N. L. South, for Appellee.

49 Be it remembered that at a Court of Appeals held at t Capitol at Frankfort on the 17th day of May 1907, the fo lowing order was entered to-wit:

BROWN-FOREMAN COMPANY
v.
COMMONWEALTH.

Franklin.

Came the appellant by counsel and on motion is given 15 days e tension of time to file a petition for rehearing.
And afterwards at a Court of Appeals held at the Capitol at Fran fort on the 4th day of June, 1907, the following order was entere to-wit:
Came the appellant by counsel and filed a petition and moved t Court to grant a rehearing, which motion is submitted.
(The petition for rehearing mentioned in the foregoing order is follows:)

50 Kentucky Court of Appeals, April Term, 1907.

BROWN-FOREMAN COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Petition for Rehearing.

And now comes the Brown-Foreman Company, appellant herei and prays the Court to grant it a rehearing as to the followi questions affecting the constitutionality of the Act of March 28t 1906, considered by the Court in its opinion affirming t
51 judgment of the Franklin Circuit Court in this caus namely:
First. As to the question whether the act approved March 28t 1906, entitled:

"An Act relating to revenue and taxation, providing for license taxes on compounded rectified, adulterated or blended distilled spirits, known and designated as single stamp spirits, and providing penalties for violations of its provisions,"

is in violation of Section 51 of the Constitution of Kentucky, in that, the subject of said Act, as construed by the Court, is not expressed in the title thereof; and.

Second. As to the question whether the provisions of said Act are not in violation of the Fourteenth Amendment to the Constitution of the United States, in that it denies to persons compounding,
52 rectifying or blending distilled spirits within the jurisdiction of the State of Kentucky, the equal protection of the laws, by requiring such persons to pay a tax to the State of Kentucky, of one and one-quarter cents upon each wine gallon of spirits so compounded, rectified, or blended by them; whereas persons engaged in compounding, rectifying or blending distilled spirits in other States, may ship their product into the State of Kentucky, and dispose of the same in the State of Kentucky, without the payment of said tax.

Third. As to the question whether section 7 of said Act is not in violation of Section 202 of the Constitution of Kentucky, which provides, that,

"No corporation organized outside the limits of this State shall be allowed to transact business within this State, on more favorable conditions than are prescribed by law to similar corporations
53 organized under the laws of this Commonwealth,"

in that, a corporation rectifying whiskey outside of the State of Kentucky, may ship its rectified product into the State of Kentucky, if it is not branded "Kentucky whiskey," or intended to be so branded, and sell the same within the State of Kentucky, without the payment of the tax which the rectifier in Kentucky, must pay upon his product before selling the same; thus enabling the foreign corporation to transact business within the State of Kentucky on more favorable conditions than are prescribed for the domestic corporation; and,

Fourth. As to a question not considered by the Court in the decision of this cause, though covered by the pleadings, and brought to the attention of the Court at the argument, viz, whether the act under consideration does not violate the Fourteenth Amendment to the Constitution of the United States, in that it unjustly dis-
54 criminates against the appellant, as a manufacturer of whiskey by one process, and in favor of the manufacturers of whiskey by another process, thereby depriving the appellant, as a rectifier, of the equal protection of the laws.

As to the First Question.

It may be conceded in considering the first question upon which a reargument is respectfully asked, that the tax imposed by the body of the Act, is a tax upon the occupation or business of compounding, rectifying, blending or adulterating distilled spirits, and that the body of said Act does not violate Sections 171, 172, 174 and

180 of the Constitution of Kentucky, as has been held by the Court; but it is respectfully contended that the title to the Act does not express what the Court has declared to be the purpose of the Act, as contained in the body of the Act, and in this particular
55 is in conflict with the previous decisions of this Court in the case of H. A. Thierman Company *vs.* Commonwealth, 97 S. W. Rep. 366; and in the case of Chiles & Thomas *vs.* Munroe, 4 Metc. (Ky), p. 72, neither of which cases was referred to in the opinion of this Court, although cited in the brief of counsel.

The Court in its opinion in this case, after considering the effect of a title which states that the Act relates to revenue and taxation, proceeds to say, that,

"The remainder of the title in no way narrows the meaning of the words 'An Act relating to revenue and taxation.'"

The remaining words of the title thus referred to, are as follows:

"providing for license taxes on compounded, rectified, adulterated or blended distilled spirits, known and designed as single
56 stamp spirits, and providing penalties for violations of its provisions."

"On the contrary," says the Court, "the remaining words of the title clearly show that the Legislature had in mind a license tax on compounded, rectified, adulterated or blended distilled spirits,"

which is precisely what we contended for in our original brief.

Later on in the opinion, the Court condenses the foregoing statement of the purpose of the Act, as expressed in the title, as follows:

"Omitting other words as shown by the title of the Act it provides for a license tax on rectified distilled spirits."

Revenue and taxation may be said to be a genus, or generic phrase, comprehending all forms of taxation. A "license tax" is
57 but one of the numerous forms of taxation, and may, therefore, be said to be a species, and a license tax on compounded, rectified or blended distilled spirits, is a vain attempt to create a nondescript sub-species, unknown to legal nomenclature.

It is logically impossible for either the species, or this pseudo sub-species, to be as comprehensive as the genus, or generic phrase.

The title to the Act, grammatically considered, should be read thus:

"An Act * * * providing for a license tax on compounded, rectified, adulterated or blended distilled spirits."

The words, "in relation to revenue and taxation," constitute merely a parenthetical sentence, indicating the general nature of the Act, and their scope and compass are declared, explained and defined by the subsequent operative and controlling words of
58 the title, above quoted, and their meaning is thus narrowed to the limits fixed by such subsequent words.

If the words "relating to revenue and taxation" are not so limited and restricted by the subsequent words of the title, the Legislature might, under the title of this Act, though specifically providing for a license tax on distilled spirits, have lawfully embodied in the Act,

provisions relating to the collection and disbursement of the revenue, and regulating and defining the duties of sheriffs, assessors, collectors and other officers, in connection therewith, as well as provisions for license taxes on lawyers, stock breeders, and traders; yet who would expect under such a title to find such provisions?

The Court has held in its opinion in this case, that the exaction laid by the Act is of such a limited special and distinctive nature, that it cannot even be designated as a "tax" within the mean-
59 ing of section 180 of the Constitution.

Now do not the words of the title which provide for a levy or exaction that is not entitled to be called a tax under a provision of the Constitution relating generally to taxation, narrow the scope of the words "relating to revenue and taxation," which when formerly used, without other words, were supposed to cover all taxation of every kind?

And in view of the decision of the Court in this case, to the effect that a license tax is not a tax within the meaning of section 180 of the Constitution, must not the words "relating to revenue and taxation," when employed alone, be now held to refer to and include, only general taxes, or the taxes contemplated by section 180 of the Constitution?

And if the Legislature intends to provide for the payment of license fees on franchises, the various trades, occupations and professions, or for a special or excise tax, as provided in section
60 181 of the Constitution, must not such purpose be specifically designated in the title of the Act, because relating to a distinct class of taxes, created by the Constitution and not embraced in the general revenue; and if not so designated, must it not be held that the title would fail to express such purpose? How then can the words, "relating to revenue and taxation," be held to cover the body of the Act in this case?

But whether or not the words "An Act in relation to revenue and taxation", can now be held sufficient to cover an occupation tax, the title in the case at bar expresses a purpose to provide a tax on rectified distilled spirits, and the expression of such purpose, relating as it does to a single subject, is necessarily a limitation upon the general phrase, "relating to revenue and taxation", and it follows that the body of the Act cannot be broader than this limited expression of the purpose of the Act, contained in the title.

61 If the words, "providing for a license tax on * * * rectified distilled spirits", had been connected with the words "relating to revenue and taxation" by the copulative conjunction "and", so that the title would read, "An Act relating to revenue and taxation and providing for a license tax on * * * rectified distilled spirits," there might be some room for the contention that the words, "relating to revenue and taxation," were intended to apply to any matter of taxation except that covered by the words "providing for license taxes on * * * rectified distilled spirits," (which were specially provided for) and that the body of the Act was covered by the words "revenue and taxation"; though this view would leave nothing in

the body of the Act to respond to that portion of the title which provides for a license tax on rectified distilled spirits.

But the use of the copulative conjunction "and, as above
62 suggested, would have manifested an intention on the part of the Legislature to express a double purpose in the title of the Act—a general purpose and a specific purpose—and each would constitute a subject of legislation within the meaning of Section 51 of the Constitution.

The conjunction "and", however, not having been used in the title, as above suggested, there is no possible room for the contention that the body of the Act can be supported by the words of the title, "relating to revenue and taxation"; and yet the Court has construed the title as if the conjunction "and" were found in the title, between the words "revenue and taxation", and the words, "providing for a license tax on rectified distilled spirits".

In the opinion of this Court in the Thierman case, 97 S. W. Rep. 366, where this identical title was under consideration, the Court, after quoting Section 51 of the Constitution, and then quot-
63 ing the title of the Act, and summarizing the first and second sections of the Act imposing a tax, fixing the amount thereof, and providing for a report to the Auditor, said:

"The tax imposed is not upon the manufacture, but is upon the sales as shown by the report."

The Court further said:

"The Act does not in any wise seek to control the volume of business done or the right to conduct the business. * * * The Bill does not seek to control the quality of the manufactured product, or in any wise to regulate its sale, but the State, through the provisions of this Bill, is seeking but one purpose, that of collecting a tax upon the volume of the business done by the rectifier. He may make any kind of liquor he chooses, good or bad. He
64 may sell in any way he can, to any person able to buy, and in any quantity, and in these particulars, the State has no interest whatever, so far as this Bill is concerned.

Through this Bill the State says to the rectifier: 'You must pay a tax of fifty cents upon each barrel of spirits, and pay twenty-five cents upon each package of spirits less than a barrel which you sell.' "

Why did the Court in the last sentence quoted above, omit the word "license", used in the title and in the body of the Act in connection with the word "tax", unless the Court regarded it as a misnomer, and was of opinion that it was superfluous and unmeaning when applied to a tax on property; and how could the Court say, as it said in the first extract above quoted, that, "The tax imposed is not upon the manufacture," when both the title of the Act and the first and second sections of the Act designated the tax imposed, as a "license tax", unless the word "license" was to be dis-
65 regarded as unmeaning when employed in connection with the word "tax" and applied to tangible property, such as distilled spirits.

The question then, as to the meaning of the title of this Act, would seem to have been settled in favor of the appellant's conten-

tion, by the decision in the Thierman case, *supra*, and also by the language adopted by the Court in this case, above quoted, declaring the tax contemplated by the title to be

"a license tax upon compounded, rectified, adulterated or blended distilled spirits,"

which is not a license tax upon the business or occupation of compounding, rectifying, blending or adulterating distilled spirits.

With the most profound respect, we earnestly insist that this Court has no authority to make a material amendment of the
66 title to the Act, in order to make it conform to the body of the Act. Under Section 181 of the Constitution, the Legislature may provide for a license tax upon franchises, upon the use of stock for breeding purposes, the various trades, occupations and professions; but there is no authority in that section for levying a license tax on the property produced by any trade or occupation. Tangible property, such as distilled spirits, is subject to taxation under Section 174 of the Constitution.

Where a license tax is placed upon an occupation, trade or business, of course, the amount of that tax may be based upon, or measured by, either quantity or value of the thing produced; but the license tax must in such case be distinctly levied upon the business or occupation.

What the legislature may have thought was a sufficient title for the body of the Act, is wholly immaterial in this inquiry. If they have failed to employ fit and appropriate words to express, in the title, the object of the Act, the Act cannot become a law.

67 The only antidote for legislative heterophemy to be found in the Judicial Formulary, is the one which we ask this Court to apply.

As said by the Supreme Court of Alabama in Perry County *vs.* Railroad, 58 Ala. 546, and approvingly quoted by this Court in H. A. Thierman Co. *vs.* Commonwealth, 97 S. W. 366, l. c. 369:

" 'We think the only safe rule for interpreting clauses of the Constitution which command certain things to be done and certain methods to be observed in the enactments of statutes, is to hold that when it is affirmatively shown by legal evidence that in the attempt to legislate, some mandate of the Constitution has been disregarded, such attempt never becomes a law."

No good purpose can ever be served by straining a pro-
68 vision of the Constitution to the breaking point, merely that the Legislature may not be declared to have made a futile effort. Better, far better, for the cause of constitutional government that the Legislature should be told to go back and do it right, or not do it at all.

In the case of Chiles & Thomas *vs.* Munroe, 4 Metc. (Ky.), p. 72, the title of the Act was,

"An Act to amend the second section of Article Sixty-three of the Revised Statutes, entitled "Limitations of Actions.' "

The title affected only the second section of the chapter on "limitations." The subject, and only subject, of that section is, "the

limitation of actions for the recovery of real property," but the Act, which, according to its title, purported to amend but a single section of the Chapter, was very much broader, and compre-
69 hended and operated upon almost every section of the entire chapter.

While the title related to Article 63 of the Revised Statutes, its purpose, as expressed in the title, was to amend only the second section of that Act, and for the reason that the body of the Act was not limited to the particular section intended to be amended, the Act was declared to be unconstitutional and void.

Suppose the title of the Act in that case had been, as it might have been,

"An Act in relation to Article Sixty-three of the Revised Statutes, entitled 'Limitations of Actions,' providing for an amendment of Section Two thereof,"

can there be any doubt but what the Court would have declared the body of the Act to be void as not conforming to the title?

That case will be seen upon examination to be on all-fours with the present case.

70 The title to an Act is, under the provisions of the Constitution of Kentucky, a part of the Act, and a necessary part of the Act, and it is as essential for the title of the Act to conform to the requirements of the Constitution, as that the body of the Act should so conform; and the purpose expressed in the body of the Act must also be expressed in the title.

In the case of Gulf C. & S. F. Ry. Co. *vs.* Stokes, 91 S. W. Rep. 328, the Act under consideration was entitled "An Act prohibiting railroad and railway companies or corporations from permitting Johnson grass or Russian thistles from going to seed on their right of way, and fixing a penalty."

It was held that such title was insufficient to sustain a provision for damages to persons injured, and that so much of the
71 statute as authorized a recovery of such damages was invalid.

In the case of Jones *vs.* Thompson's Executors, 12 Bush., 394, the title of the Act under consideration was "An Act increasing the jurisdiction of the justices of the peace in Crittenden, Caldwell and other counties of this Commonwealth."

The first section of the Act increased the jurisdiction of justices to $100 in about fifty of the counties of the State in actions for the recovery of money or personal property, and the second section provided that upon all judgments thereafter rendered in justices' courts by virtue of the provisions of said Act, where the amount in controversy is of the value of less than $500, and as much as $10 or more, inclusive of interest and costs, appeal might be had by either party to the Circuit Court of the county in which the judgment was rendered.

The Constitution then, as now, provided, that "no law en-
72 acted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title."

The Court held that the subject to which the Act related as stated

in the title, was increasing the jurisdiction of Justices of the Peace of certain counties, but in the body of the Act, and after legislating on the subject named in the title, a section was added, and a subject entirely different from the one named in the title, by which the Legislature undertook to regulate the appellate jurisdiction of quarterly and circuit courts in appeals from Justices of the Peace in the counties named, and the Court held that so far as the Act undertook to affect the appellate jurisdiction of the quarterly and circuit courts of the counties named, it was in conflict with the Constitution and was null and void.

In the case of Lewis County Court *vs.* Lovell, 3 Ky. L. R.
73 334, the title of the Act under consideration was "An Act in relation to the County levy of Lewis County, and the collection of the revenue."

The second section of the Act related exclusively to Sheriff Lovell, and directed him, after he had gone out of office, to return to the county court the names of all delinquent taxpayers of the county levy for the years 1871 and 1872, and the tax receipts of the same.

The Court held that the title did not give the slightest intimation that Lovell was commanded by the second section of the Act to render personal services and surrender his personal property without just compensation, and the Act was held to be void.

While we have acquiesced in the ruling of the Court that
74 the body of the Act construed in its entirety, imposes a tax on the occupation of rectifying distilled spirits, notwithstanding the absence of some of the provisions stated in the Thierman case, *supra,* to be necessary to such a construction, it may be remarked that it cannot be by reason of anything contained in the first section of the Act, which provides for a license tax of one and one-quarter cents upon every wine gallon of rectified distilled spirits, that this Court has held the body of the Act to impose a tax on the business of rectifying. If the first section stood alone as defining the nature of the tax, this Court would have to declare, as it declared in the Thierman case, *supra,* that no tax was imposed upon the manufacture of distilled spirits, or upon the business of rectifying.

Have we not, then, in view of these facts, a right to ask from this high tribunal, a literate and determinate interpretation of the
75 words "license tax on rectified distilled spirits," which the Court says is the substance of the title of the Act?

In our former brief and argument, we referred this Court to the case of State *vs.* Bengsch, 170 Mo. 81, which while not controlling, should at least, have been regarded as persuasive authority.

In any event, was not Judge Valliant of the Supreme Court of Missouri hermeneutically correct when he penned the sentence,

"There is no such thing as a license tax on distilled spirits,"

and were we not correct when we said, in our original brief, in this case, that it is a solecism in language, if not a contradiction in terms, to speak of license taxes on property?

76 Wherever the word "license" occurs in such connection, is it not the duty of the Court to disregard it as a misused word? Does its misuse authorize the Court to assume the function of the

Legislature, and amend the title of the Act by the introduction of the words, "the business or occupation of," and the transformation of four adjectives into four participles, making "compounded" to read "compounding," "rectified" to read "rectifying," "adulterated" to read "adulterating," and "blended" to read "blending," making the whole title to read:

"providing for license taxes on the business or occupation of compounding, rectifying, adulterating or blending distilled spirits."

77 The Court does not say that the Legislature even "had in mind" such a title. The Court does say, the Legislature "had in mind" a license tax on compounded, rectified, adulterated or blended distilled spirits.

If the Legislature "had in mind" a license tax on compounded, rectified, adulterated or blended distilled spirits, and used those words in the title for the purpose of expressing its mind, how can it be said that the words "relating to revenue and taxation" are the operative and controlling words of the title, and that by using them, the Legislature "had in mind" to create a tax on the business of rectifying distilled spirits?

Must not the meaning of the words, "relating to revenue and taxation" be narrowed to meet the meaning of the words "a license tax on compounded, rectified, adulterated, or blended distilled spirits;" or, if not, must not this Court entirely disregard what it has said that the Legislature "had in mind"?

78 It is not clear, as heretofore argued, that the words, "relating to revenue and taxation," are limited and controlled by the subsequent words of the title?

These subsequent words, as heretofore construed by the Court, import a tax on distilled spirits—that is, a tax on property.

The Court has decided that the body of the Act provides for an occupation tax.

The subject of the body of the Act is not expressed in the title; and the Act never became a law.

At the argument we contended that the body of the Act did not provide for an occupation tax, but provided for a tax upon property, and that the title to the Act also provided for a property tax; but we also contended that if it should be held by the Court that the

79 body of the Act provided for an occupation tax, that then the Act would be void, for the reason that no such subject was expressed in the title, and that the title unquestionably, under the decision in the Thierman case, provided for a tax upon property.

While we have acquiesced in the decision of the Court as to the construction of the body of the Act, we still insist for the reasons we have heretofore given in this petition, that the body of the Act does not conform to the title of the Act, and that, therefore, the whole Act is invalid.

The fact that the Act now being considered by the Court was passed at a special session of the Legislature, probably convened for that purpose, gives it no greater sanctity, nor any greater right to

exemption from constitutional requirements or restraints,
80 than the Act considered by this Court in the Thierman case, passed at a regular session of the Legislature; and we respectfully ask for this Act the same judicial analysis which was accorded to that Act.

As a subdivision of the first question, we call the attention of the Court to the following paragraph in the opinion:

"Section 7 of the act is a legislative exercise of the police power to protect the people of the State against deleterious compounds, to prevent shifts or devices to evade the tax, and to protect the manufacturers of the State against competition with rivals who falsely mark their goods Kentucky whiskey to deceive purchasers."

Has there ever been a case in judicial annals, where, under
81 a constitution similar to that of the Commonwealth of Kentucky, it has been held to be proper to combine the exercise of the taxing power and the exercise of the police power in one enactment under a title which relates exclusively to the taxing power?

As to the Second Question.

We now come to the second question upon which we respectfully ask for a rehearing.

Does the Act under consideration violate the Fourteenth Amendment to the Constitution of the United States?

By this amendment to the Constitution it is declared that no State shall deny to any person within its jurisdiction the equal protection of the laws.

The body of the Act under consideration imposes upon
82 the rectifier, compounder or blender doing business in this State, a license tax of one and one-quarter cents upon every wine gallon of distilled spirits rectified, compounded or blended by him.

By the Seventh Section of the Act, every compounder, rectifier or blender of distilled spirits in any State, other than the State of Kentucky, who ships into Kentucky, whiskey labeled as "Kentucky whiskey," or intended to be labeled as "Kentucky whiskey," after it reaches the State of Kentucky, is required to pay the same tax which the compounder, rectifier or blender doing business in Kentucky is required to pay.

The rectifier in Kentucky can perhaps make no objection because a tax is put upon such rectified imported goods so labeled, equal to the tax put upon his own product, though this consideration
83 does not render such a tax on the foreign rectifier constitutional. But the rectifier in Kentucky can complain that the compounder, rectifier or blender in another State, is permitted to ship into the State of Kentucky all the compounded, rectified or blended distilled spirits he may desire, and if he does not label it "Kentucky whiskey" or intend so to label it, after it reaches the State of Kentucky, he is not required to pay any tax whatever to the State of Kentucky upon such rectified goods, and he is thereby enabled to undersell the rectifier in Kentucky.

There is no requirement in the law that the rectifier in Kentucky

shall label his goods "Kentucky whiskey." He may use in his business of rectification, distilled spirits not made in the State of Kentucky, and doubtless does so. This discrimination renders that provision of the Act a nullity, and without that provision of the Act, the last vestige of the delusive semblance of equality in the
84 law, as to the Kentucky rectifier, entirely disappears, and the whole Act must fall under the interdict of the Fourteenth Amendment to the Constitution of the United States.

But, further, the State of Kentucky has no right to impose a tax upon the rectified whiskey made in Kentucky and labeled as "Kentucky whiskey," while in Kentucky, which may be shipped out of the State of Kentucky and reshipped into the State of Kentucky still bearing the label originally placed upon it in Kentucky, because of the fact that at the time of its reshipment into the State of Kentucky, it was labeled "Kentucky whiskey;" yet Section 7 of the Act prohibits such reshipment into the State, of whiskey so labeled, without the payment of the tax of one and one-quarter cents per gallon, although it may have paid the same tax before it left the State.

It is to be remembered, too, that this section of the statute
85 does not impose a tax upon rectified whiskey brought into the State, which is falsely labeled "Kentucky whiskey," but upon all rectified whiskey so labeled.

As shown by the opinion of this Court in the Thierman case, *supra,* Section 7 cannot be held to be operative as a police regulation in this case, because it permits the foreign rectifier, or any dealer, to ship into the State of Kentucky, any amount or kind of rectified distilled spirits, good or bad, and sell the same without restraint, or regulation, and without payment of any tax, if it is not labeled "Kentucky whiskey," or intended to be labeled "Kentucky whiskey;" and if it is labeled "Kentucky whiskey," or intended to be labeled "Kentucky whiskey," whether falsely so labeled or not, it shall pay a tax of one and one-quarter cents per gallon, and may then be sold without regulation or restraint, no matter how deleterious it may be.

86 It is difficult for the mind to magnify such a puny provision into the proportions of an appreciable barrier between the deleterious product of the foreign rectifier and the health of the people of Kentucky, and to dignify such a provision with the appellation of a police regulation.

It lacks every element of a police regulation, except the payment of the paltry sum of one and one-quarter cents on enough of the deleterious compounds made by foreign rectifiers, if their product be what its enemies declare it to be, to wreck the health of at least ten good citizens of Kentucky, to whom it may be sold without let or hindrance.

We respectfully suggest that this provision was not born of any solicitude for the health of the people of Kentucky, but had its origin in an effort to take the Act from under the ban of Section 202 of the Constitution of Kentucky, and the Fourteenth Amend-
87 ment of the Constitution of the United States.

But even if it may be held to be valid as a police regula-

tion, what is to be said of an Act which combines both the exercise of the taxing power and the exercise of the police power, under a title which relates only to the taxing power?

Similar legislation to this was enacted in the State of Vermont, and declared by the Supreme Court of that State to be in violation of the Fourteenth Amendment to the Constitution of the United States.

In the case of State *vs.* Hoyt, 71 Vt. 59, it appeared that the defendant was indicted for peddling without a license.

The Act under which he was indicted required a license
88 fee to be paid, and imposed a penalty for failing to pay the same, upon any person who peddled certain articles of domestic manufacture.

The Statute did not include similar manufactures of other States, although they could constitutionally have been put upon the same footing with the domestic manufactures.

The Court, among other things, said:

"A. manufactures watches in Vermont and B. manufactures precisely the same kind and grade of watches in New Hampshire; each peddles his goods in Vermont. A. pays a license tax of $60 for each of his peddlers, while B. pays no license fee for his; A.'s goods are discriminated against. Now the equality clause of the Fourteenth Amendment provides that no State shall deny to any person within its jurisdiction, the equal protection of the laws. The re-
89 spondent invokes this clause and says that the statute is obnoxious to it by reason of its discrimination."

and the statute was held to be unconstitutional.

A similar ruling was made in State *vs.* Shedroi, 75 Vt. 277, in which case it was held that a State cannot make an arbitrary classification for the purpose of taxation, which discriminates between citizens of the same State.

See also—

State *vs.* Montgomery, 94 Me. 192.
State *vs.* Gabrowski, 111 Iowa, 496, l. c. 502.
Quartlebaum *vs.* State, 79 Ala. 1;
Graffty *vs.* City of Rushville, 107 Ind. 502;
Gulf Colo. & Santa Fe R. R. *vs.* Ellis, 165 U. S. 150;
County of Santa Clara *vs.* South. P. R. R., 9 Sawyer 165, 210;
90 Ward *vs.* State of Md., 12 Wall. 163;
Lappin *vs.* District of Columbia, 22 App. p. 68;
Ex Parte Deeds, 75 Ark. 542.

The statute under review in the case before the Court provides for a tax of one and one-quarter cents upon every gallon of rectified spirits of domestic manufacture, but does not provide for a tax of one and one-quarter cents upon every gallon of rectified spirits of foreign manufacture shipped into the State of Kentucky, for sale. The domestic manufacturer who rectifies spirits, is thus plainly discriminated against by this Act, and it should for that reason be declared to be void.

As to the Third Question.

The third question upon which we respectfully ask a re-
91 argument is, whether Section 7 of the Act under consideration, is not in violation of Section 202 of the Constitution of Kentucky, which provides that:

"No corporation organized outside the limits of this State shall be allowed to transact business within this State, on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this Commonwealth."

In applying this provision of the Constitution to the case in hand, the Court said, that as the license tax is imposed upon the occupation of rectifying in this State, a foreign corporation pursuing the same business in this State, must pay the tax no less than a home corporation doing the same business in the State, and that the home corporation, engaged in the rectifying business, not in Kentucky, but elsewhere, is no more liable to the tax than a foreign corporation engaged in the business in another State, but not in Kentucky.

92 Said the Court:

"The home corporation and the foregin corporation stand just alike under that statute. Both are liable to the tax if they engage in rectifying in the State, and neither is liable if it does not so engage in the business."

We respectfully suggest that the foregoing construction of Section 202, as applied to the case before the Court, is entirely too restricted. The dominant and controlling idea in Section 202 of the Constitution is to be found in the words, "shall be allowed to transact business within this State."

In order that the foreign corporation may "transact business within this State on more favorable conditions than similar corporations organized under the laws of this Commonwealth," it is not
93 necessary that both corporations shall be engaged in the business of rectifying spirits in the State of Kentucky. It is undoubtedly true that a foreign corporation might, with the permission of the State of Kentucky, establish a rectifying plant in the State of Kentucky, and its product would then come under the law imposing a tax of one and one-quarter cents upon each gallon of distilled spirits produced, and both would be equally taxed; but may not a foreign corporation, engaged in the business of rectifying outside of the State, transact business in the State of Kentucky by selling its manufactured product in the State of Kentucky? The rectifier in Kentucky undoubtedly manufactures his product for sale, not for amusement, or for the retention and exhibition of his product, but for profit—that is, for sale on the market—and if a foreign corporation, engaged in rectifying, can sell its product upon more favorable terms in the State of Kentucky, than the rectifier in Kentucky is permitted to sell his product, by reason of the tax placed upon the product of the Kentucky rectifier, which is not placed upon
94 the product of the foreign rectifier, does not the foreign corporation "transact business" within the State of Kentucky upon more favorable terms than the Kentucky corporation?

It is clearly not necessary that the foreign corporation should be a

rectifier within the State of Kentucky, in order to "transact business" within the State of Kentucky.

If we are correct in this view, the Act in question is undoubtedly in conflict with Section 202 of the Constitution and for that reason should be declared to be void.

As to the Fourth Question.

We cannot avoid being impressed with the feeling that the key-note of the whole decision is to be found in the following statement in the opinion:

"It is a matter of common knowledge that a large part of
95 the whiskey used in the United States is rectified; that is, that a barrel of whiskey as it comes out of the distillery, is adulterated by the rectifiers so as to make five or six barrels of whiskey out of it, (Taylor *vs.* Taylor, 27 R. 628) and it is this business of multiplying the whiskey which is distilled, that the legislature imposed the license tax upon."

In making such statement the Court does great violence to well ascertained and incontrovertible facts in regard to the manufacture of whiskey, of which the Court should take judicial notice, and such a statement should not be permitted to stand.

The Act uses the words "distilled spirits" and does not refer to whiskey, *eo nomine*.

No distinction is made in the Act before the Court between the different kinds or classes of distilled spirits, such as "high wines," "spirits," "whiskey," "brandy," "gin," "rum" and the like,
96 all of which are distilled spirits, whether sold under the double stamp or sold under the single stamp.

The rectifying, compounding or blending referred to in the Act, may be as fully accomplished by the mixing of distilled spirits produced by the same distiller as by the mixing of distilled spirits produced by different distillers; and since the Act does not limit the compounding to that which is accomplished by the mixing of distilled spirits with other material, or to the mixing of distilled spirits produced by one distiller with distilled spirits produced by another distiller, the Court is clearly reading something into the law which is not only not justified by anything which appears in the Act itself, but the conclusion thus stated is contrary to the facts.

It is possible to take five or six barrels of distilled spirits produced either by the same or by different distillers, and make five or six barrels of a uniform product, but it is a physical impossibility to take one barrel as it comes out of the distillery and make five
97 or six barrels out of it, unless the rectifiers possess the power which was possessed by him who worked the miracle of the loaves and fishes. This is true whether the distilled spirits are referred to merely as distilled spirits, or as whiskey.

It is, of course, possible to take a barrel of distilled spirits, or whiskey, and five barrels of water and mix them together, and produce six barrels of a liquid; but such a mixture would be chiefly water and of such low alcoholic strength as not to commend itself

to any one who desired an alcoholic beverage; nor would such mixture be the deleterious compound stigmatized by the Court.

Apart from coloring or flavoring matters which are added by rectifiers in making their whiskey, as well as by distillers in making their whiskey, the rectifier uses only distilled spirits.

If a rectifier should take a barrel of whiskey containing
98 the brand of the distiller, such as "Red Rose Whiskey," for illustration, and should mix this with five other barrels of whiskey produced by some other distillers, and mix the six barrels and thereby produce six barrels which he should undertake to brand as "Red Rose Whiskey," it might be said that he was multiplying that particular brand of whiskey by such an operation, but it could not be said that by such a mixing he was multiplying whiskey.

Is the Court not in error, therefore, when it says:

"It is this business of multiplying the whiskey which is distilled, that the Legislature imposed the license tax upon."

Under the law, if a person or corporation located in Kentucky buys a barrel of distilled spirits from a distillery at Frankfort, and a barrel of distilled spirits from a distillery in Louisville or Lexington, and mixes these two barrels together, so as to produce
99 a uniform article, the license tax referred to applies, but it has taken the two barrels of different kinds of distilled spirits to produce two barrels of a uniform distilled spirit, but there has been no such multiplication as the Court has stated.

Two and two may make four, but two alone cannot make four.

We will presently demonstrate that the distillers in addition to their ordinary business of distillation, have, of recent years, engaged in the business of manufacturing whiskey—the same business in which the rectifier has always been engaged.

The distillers use the distilled spirits produced by themselves, while the rectifiers purchase and use the distilled spirits made by the distillers.

The Act before the Court levies a license fee upon the business of manufacturing whiskey conducted by the rectifier, but it imposes no tax upon the distiller when he engages in the same busi-
100 ness, of manufacturing whiskey, in which the rectifier is engaged.

The inhibition of the Fourteenth Amendment that no State shall deprive any person or class of persons of the equal protection of the laws, was designed to prevent a person or class of persons from being singled out as a special subject of discrimination and hostile legislation.

Such discrimination is forbidden. Classifications that are reasonable may be sustained, but a classification cannot be arbitrary, and it never can be used as a cloak to cover unjust discrimination.

Is not this the very thing that the Legislature has attempted to do in this case, and has it not singled out one class of business and unjustly discriminated against it, in the exercise of the taxing power; and does not the decision of the Court in this case sustain this discrimination; and is not the Court in error in sustaining this

discrimination upon the ground, as stated by the Court, that
101 rectifiers take one barrel of distilled spirits or whiskey, as it comes out of the distillery, and by some process of legerdemain convert it into five or six barrels of whiskey?

The Act uses the words "distilled spirits;" the Court uses the word "whiskey." Does the Court use the word "whiskey" as synonymous with the words "distilled spirits," or is the term "whiskey" used as referring to something other than distilled siprits? If so, what is whiskey, and how is it produced, and is it possible for such a thing to be accomplished, as is declared by the Court to be a fact, that one barrel of whiskey can by any process be converted into six barrels?

The judicial knowledge which the Court possesses on this subject cannot be at variance with the facts.

Now what are the facts with reference to the manufacture of whiskey, of which the Court should take judicial notice?

102 Whiskey is sometimes referred to as a natural product, but as a matter of fact, it is an artificial product.

Mr. Justice Matthews, referring to "spring water" and "whiskey," said:

"It is true, as observed by counsel in argument, that in that case **the article of merchandise was a natural** and not, as in the present, an artificial production."

Pepper *vs.* Labrot, 8 Fed. Rep. 29, l. c. 44.

The article referred to as a natural production was the spring water. The article referred to as an artificial production was the whiskey.

This Court knows that there was a time when there was no United States Internal Revenue law to interfere in any way with a person who was producing or manufacturing distilled spirits or whiskey, or which undertook to say what he could do, or what he
103 could not do, or what he could do without the payment of a special tax, or what he might do which would subject him to the payment of a special tax.

This Court also knows that the methods of manufacture, and the processes, have changed in many respects, since the War, or the enactment of the U. S. internal revenue laws.

The process of distillation is usually divided into three parts:

First, the mashing, which includes the grinding of the grain, and the conversion of the starch into sugar; second, fermentation, or the conversion of sugar into alcohol; and third, the distillation, which is the separation of the liquid or volatile matters from the solids.

The first distillation produced "low wines" or "singlings;"
104 the second distillation, which is the distillation of the "low wines," produced "high wines" or "doublings." These "high wines" or "doublings" are raw or crude whiskey.

See Practice of Pharmacy by Remington, 4 Ed. 761.

Bulletin No. 102, Dec. 20, 1906, Bureau of Chemistry, U. S. Department of Agriculture, on manufacture of whiskey in the United Kingdom, pp. 8 and 9.

U. S. Dispensatory on Whiskey.

By an improved or chambered still, which is sometimes referred to as the Coffey or patent still, so as to distinguish it from the old-fashioned pot-still, these two processes may be combined and the "high wines" produced by a single run, but no matter what process or what character of still was used, the article thus produced was known as "raw spirits" or "raw whiskey."

"The term "raw Spirits" must be understood as including
105 all spirits in the state in which they are produced by the distiller, all of which must be entered in the distillery warehouse, and duly withdrawn therefrom upon the payment of tax, and which should, except in cases where there has been a change of package, bear the distillery warehouse and tax-paid stamps."

From Regulations of the Int. Rev. Dept. in 1869 Vol. 10, U. S. Int. Rev. Rec. p. 83.

In those early days the double stamp spirits were, therefore, known as "raw spirits," or "high wines," sometimes referred to simply as "wines."

The term "whiskey" was not understood as applicable to the article in the form in which it was produced by the distiller unless it was subjected to a further treatment. It was the subsequent treatment to which it was subjected, and which was usually referred to as rectification, which was recognized as producing "whiskey."

106 "Pouring the wines into the vat was the first act towards rectification, which was followed by the rectifying process, thereby changing the wines into whiskey."

U. S. *vs.* 8 Bbls., 6 Int. Rev. Rec., 124 (1867);
25 Fed. Cas. No. 15,028, page 982.

Before the internal revenue laws were enacted, a distiller could take his raw product and rectify it or treat it in any way he saw fit, so as to produce a pure and finished article, but it was the clear and manifest purpose of the U S. Internal Revenue Laws, that no one should be entitled to produce an article which was to be known as whiskey, unless he paid special tax as rectifier.

The regulations which were issued by the Treasury Department in 1869, after stating how the article should be known in the state in which it was produced by the distiller, go on and say that after the raw spirits have been rectified, they must be put into a
107 package, *guaged* and marked with the particular name of such spirits as known to the trade, which mark should be substantially as follows:

"Thomas P. Smith,
U. S. *Guager*, 1st Dist. Penna.
Insp. May 15th, 1869.
Rye whiskey, Proof 102.
Greenleaf & Company, Rectifiers and Wholesale Liquor Dealers,
10 and 12 South Street,
Philadelphia, Pa.
Stamp No. 64,275."

Note the name "whiskey."

Distillers who did not want to qualify as rectifiers or pay a rectifier's special tax, then began to devise methods of circumventing the law by adopting a process which would enable them to
108 produce, as distillers, an article which might appear to be whiskey, and which would be apparently the same as the whiskey which had previously been made by rectification after the distillation.

This led to what is known as the barrel-charring process, for by burning the inside of the barrel, not only is the char produced, which was supposed to have had a purifying effect upon the spirits, but the xylose or wood sugar in the wood is also by the burning converted into caramel, thus furnishing a coloring and flavoring material to the spirits.

The process of absorbing the coloring and the flavoring matters from the wood is a slow one, and thus the so-called maturing process takes a number of years.

When the process first originated, it was asserted by the distillers that this process would remove the fusel oil as effectually as the mechanical processes which had previously been used to ac-
109 complish such result; and that this process was to be preferred because thereby the fusel oil would be oxidized and changed into flavoring ethers.

It is now known, and universally conceded as a scientific fact, that this process does not produce such results, and that "distilled spirits of that character, usually referred to as "straight" whiskey, contain all the original impurities which are produced in the fermentation of the mash.

"There are volatile principles naturally existing in the grains which accompany the liquor in all its changes and give their characteristic flavor to the resulting spirit. These can scarcely be considered as impurities; but there are others produced during the process of fermentation which seriously serve to contaminate the product. Among these is Fusel oil, * * * from which it is very desirable that the spirit should be freed as soon as possible:"

110 U. S. Dispensatory, 18th Ed., p. 1280.

The claim of the distillers that the barrel-charring process would remove the fusel oil was a recognition of the fact not only that the fusel oil should be removed, in order to have a pure and finished product, but that he knew the consumer expected it to be removed in the article which was sold to him as whiskey.

Section 3287 of the U. S. Revised Statutes provides what marks, stamps and brands shall be put upon a package of distilled spirits at the time it is filled from the receiving cistern on the distillery premises, and transferred to the distillery bonded warehouse.

When this section was first enacted, it did not provide or specify what name should go upon this package, now frequently referred to as the double stamp package, but the distillers started
111 marking it "high wines," if it was put in an uncharred barrel, and "whiskey" if put into a charred barrel.

In 1872, Congress amended Section 3244 of the Revised Statutes so as to permit certain distillers to add the rectifying process to the distilling process, if it was carried on as a continuous process through closed vessels and pipes until the manufacture was completed; and against this there was a great outcry by the rectifiers, who contended that Congress was thus transferring their business to the distiller, for, as he could thus remove the impurities or rectify the "high wines" on the distillery premises, all that remained was to add coloring and flavoring, and the manufacture of whiskey was completed; and that, too, without the payment of the tax, which the rectifiers were required to pay.

As an illustration of the protests, which were made at that time, an editorial from the Cincinnati Times and Chronicle, Fri-
112 day, April 12, 1872, may be properly referred to as a part of the public literature of the day, indicating the general understanding of the public at that peroid, to the effect, that it was the rectifier rather than the distiller who produced the finished article known as whiskey:

"The Whiskey Amendments and the Rectifiers.

"The proposed modifications of the whiskey tax involve more than is at first visible to the ordinary reader who has little knowledge of the subject in detail.

"There was a time when Cincinnati stood foremost among the cities of the world in the pork trade, and even now with all the fierce competition existing, she has few rivals in this universal article of food. It may surprise many to learn, however, that the whiskey interest here now far exceeds the heaviest trade we have ever
113 had in pork. Statistics prove that the sales of whiskey in Cincinnati, for the year ending Dec. 31, 1871, were four times as large as in New York City for the same period.

"It should be borne in mind that this large branch of trade is exclusively in the hands of the rectifiers, in this city, whose business involves immense capital, and employs expensive machinery and a large amount of labor. It is against the rectifiers that the proposed action of the Committee of Ways and Means discriminates, and that to such an extent, as, if actually carried into legislation, will virtually wipe out their business altogether. And all this will be done simply for the benefit of the distiller, not only without any benefit to the Government, but probably quite the contrary, by removing safeguards now existing. As the laws now are, the rectifier stands in the light of an indorser that the tax will be paid and except in localities where there is an evident connivance on the part of Government officials, the tax is paid.

114 "And now how is it proposed to destroy this protection? It will not do, of course, to say to the rectifier, 'You shall not transact any more business.' That would not be possible. But it is proposed to say in so many words to the distiller, 'You may distill and you may rectify, and we will not require of you the one per cent. on sales or the fifty cents per barrel which we compel the rectifier and wholesale dealer to pay.'

"In this way the distiller is allowed to do all that the rectifier can do, yet the latter is required to pay a tax which is onerous and unjust, placing all competition out of the question. If this modification of the law is consented to, it must be inferred that some one in power has an axe to grind, and the distiller is the best one to turn the grindstone. All the rectifier asks, as we understand it, is simply to be placed on the same footing as the distiller; retaining such features of the present law will enable a thorough identification of a barrel of whiskey from the time it leaves the distillery until it ceases to be used for whiskey purposes.

"It may well be asked why it was that, previous to the existing revenue laws, and before any one thought or heard of a whiskey tax, the distiller was not anxious to enter the lists as a competitor with the rectifier? Why does he now want the privilege of rectifying? Has the state of affairs changed so completely? Before the War a distiller never dreamed of selling his raw material save to the rectifier. Such a suggestion would have subjected the proposer to serious doubts as to his sanity. It certainly looks to an uninterested observer as a very curious thing, to say the least. As we have before said, this thing is worth looking into a little more closely. There is evidently more in this scheme than appears on the face of it."

An editorial in the Cincinnati Gazette of Thursday, April 11, 1872, reads as follows:

"The New Whiskey Tax Law."

"If we are correctly informed, there is a serious defect in the legislation proposed by the Committee of Ways and Means for the regulation of distilleries and rectifying establishments, and the collection of taxes on distilled spirits. The bill not yet reported, provides for a consolidated tax of sixty-five cents, to be paid at the distillery. This is a slight reduction from the present tax. That bill does not, however, repeal the unjust discrimination against rectifiers which has passed into a rule under a provision of the act of April 10th, 1869. The provision seemed to be a harmless modification of the definition of rectifier. It resulted in a ruling by Commissioner Delano, confirmed by Gen. Pleasanton, his successor, and recognized by Commissioner Douglass, permitting the distiller to leach his high wines through charcoal, and then to pass the whiskey so rectified through another still with column, and pay tax at the same rate as for high wines, upon the product. This product is a clean spirit, known to the trade as "cologne spirits," and it needs only to be colored, flavored and reduced in proof to be put upon the market in full competition with goods prepared by the rectifiers. Although the distiller has not the right to flavor, color or reduce the proof, it is a well known fact that in many instances coloring matter and flavors are introduced into the barrels prior to filling, under some such plea as "tightening the joints" or 'charring the barrels,' and thus is placed upon the market, a finished, rectified, colored whiskey, which pays only the tax upon high wines.

"Now, how is it with the rectifier? He must first buy his high

wines upon which full tax has been paid. He loses by
118 evaporation in the process of rectifying and redistillation of at least two and a half per cent. upon the distillery tax, then he must pay 50 cents rectifiers' tax upon each barrel and stamp, and gauger's tax costs him 25 cents in addition, and finally he pays one per cent. upon sales; these amount in the aggregate to about five cents per gallon, and to that extent does the Government discriminate in favor of the distiller and against the rectifier.

"It is only necessary to refer to the magnitude of the rectifying trade of Cincinnati to show the extent of the hardship imposed, and the necessity of at once applying the remedy. Cincinnati is the leading whiskey market of the world. The large houses in the trade are located here, and the amount of capital and labor employed is immense. The transactions of the rectifiers of Cincinnati, for the year ending Dec. 31, 1871, amounted to 296,206 barrels and a fraction, and the sales to $14,751,578. This is more than four
119 times the trade of New York City for the same period. It will be at once seen that a discrimination by the Government against this interest to the amount of five cents per gallon, or two dollars per barrel, amounting as it does to more than half a million dollars in a single year, is not only unjust and oppressive but a blow aimed directly at one of the largest and most important branches of our business.

"The rectifier's business is legitimate. The basis of his product is high wines, which he purchases tax paid. The loss which he suffers by evaporation cannot well be avoided; that he is willing to bear. Beyond that he ought certainly to be put upon an equality with the distiller. That can be accomplished by including in the consolidated tax the special taxes now levied upon the rectifier. These, added to the proposed 65 cent tax, will not amount to more than the present tax. If, in addition, it be deemed necessary to have means for tracing distillers' spirits, the rectifier might be required to attach
120 to each barrel sold by him a stamp of nominal value, and bearing a design or registered number known to the officers. The details can be arranged by the committee. It is not our purpose to enter at large upon their discussion. What we and the public, as well as the parties engaged in the particular trade referred to are interested in, is that the law shall be just and equal in its operation, that it shall be free from objections which pertain to class or partial legislation, and that its benefits as well as its burdens, shall rest alike upon all concerned."

Congress passed the law referred to, but it answered the complaint of the rectifiers by amending Section 3287 of the Revised Statutes of the United States so as to require that the article produced by the distiller should be branded only "alcohol," "high wines" or "spirits," and that, too, in letters of not less than one inch in length.

This emphasizes the intent of the law, as previously expressed, that an article to be called or branded "whiskey," could be produced only by one who paid special tax as rectifier, and that the spirits in

the condition produced by the distiller should be known only as raw spirits.

121 Notwithstanding this amendment of the law, which was re-enacted in 1880, distillers continued to brand their article as "whiskey," and this law has been flagrantly and openly violated, and is being so violated today.

It was, therefore, originally the rectifier and not the distiller who produced whiskey, because if an article known as whiskey was originally produced by one who was a distiller, it was only because he also rectified or subjected the raw spirits to a treatment which was supposed to eliminate the impurities, and then he added coloring and flavoring in various ways.

In 1872 a protest was made to the Commissioner of Internal Revenue by the rectifiers that the distillers were adopting various devices to add color to their spirits, so as to resemble whiskey, and the then Commisisoner of Internal Revenue issued the following regulation:

122 "Special No. 111.

"OFFICE OF INTERNAL REVENUE,
"WASHINGTON, *February* 10, 1872.

"Much complaint has been made to this office by rectifiers and other interested persons, that distillers are, more or less, in the habit of mixing with their product burnt sugar or other coloring matter.

"The mixing of spirits with any material is declared by the Act of Apeil 10, 1869, to be rectifying; and rectifying can be lawfully done only by an authorized rectifier, on the premises of such rectifier, not less than 600 feet distant from any distillery.

"It is plain, therefore, that distillers cannot, in their capacity of distillers, lawfully mix their spirits with burnt sugar or other coloring matter upon their distillery premises, or anywhere else, nor even as duly authorized rectifiers, upon their distillery premises;

123 and whoever commits these violations of the law, or either of them, as the case may be, renders himself liable to the penalties prescribed therefor.

"Accordingly, assessors, collectors, and other internal revenue officers, are hereby instructed that the practice complained of must be discontinued at once; and any spirits found upon the market bearing evidence of having been so mixed will be seized, and, upon satisfactory proof thereof, forfeited.

"Collectors will furnish each distiller in their respective districts with a copy of this special.

"J. W. DOUGLASS,
"Commissioner."

15 Int. Rev. Rec., p. 53.

This evidently did not have the effect of stopping the practice, for by the use of charred barrels, color was being added to the spirits as much so as if it had been dropped through the bung hole.

The article known as the straight whiskey of today, is

124 therefore only the raw or unrefined spirit, colored and flavored by the distiller, and represents the evolution of a scheme by

which the United States Internal Revenue laws have been evaded for years, and by which the Government has been defrauded out of millions of dollars.

It is conceded that the article known as straight whiskey, contains all of the fusel oil produced in distillation, which is sometimes referred to as a congeneric product with ethyl alcohol, because it is produced at the same time during the fermentation of the mash. Is such an article a thing that has heretofore been known to science or the public as whiskey?

What is the Court's judicial knowledge on the subject, and what is it that the Court knows about that distilled spirit which contains all the fusel oil which is produced during the fermentation of the mash?

It is a matter of common knowledge that the evil conse-
125 quences of alcoholism are due chiefly to the fusel oil which is contained in alcoholic liquors, because fusel oil is the cumulative poison which leaves its imprint upon and diseases the brain.

"In the light of the recent results of patholoiogical research, there is determined to be a modification of the sweeping and oft-heard statement that the excessive use of alcohol beverages conduces to procure injury to the health. In point of fact, the statement is not true of all alcoholic liquors. If they are charged with fusel oil, their use tends to cause disease of the cerebral convolutions, which disease may eventuate in insanity, or may be but one of the symptoms of some affection of the special senses. If, however, the beverages are free of the obnoxious oil, there is not produced any such effect. In other words, alcoholic liquors made impure by fusel oil (amylic
126 alcohol) poison the brain, and induce 'amylism'; but such liquors containing pure ethylic alcohol to exclusion of that which is amylic, merely excite the cerebral functions, inducing the condition known as 'Ethylism.'

"The ills of intemperance can be entirely avoided by abstinence from liquors *and* vile with fusel oil, and by the use,—either moderate or excessive,—of those that are free from it. If men will drink alcoholic beverages, let them be those which are pure, and, by reason of their purity, will not be a factor in the ruin of body and soul. Let the cupidity of the manufacturer and dealer be checked by a law which shall make it a crime to produce, sell or use the poisonous liquors; and let encouragement be given to those who shall undertake to provide pure ethylic alcoholic beverages, harmless to the brain, medicinal in value, deficient in toxicity.

127 "Such prohibition, married with such encouragement, will appoint the only scientific specific for the evil of intemperance."

Willard H. Morse, M. D., in North American Review, July, 1888, p. 106.

"Thus the fusel oils, which are higher members of the homologous series to which ethyl, amyl and propyl alcohol belong, although they have an action similar to that of ethly alcohol, yet they

are the most frequent cause of the evil affects which the cheaper brandies, which are rich in fusel oil, have upon the lower classes."

"Materia Medica," 4th Ed., by Nothnagel and Rossbach, translated by Heineman & Burg, Vol. 2, p. 369.

"Ethylic is the common or ordinary alcohol, and amylic is an impurity existing in certain alcoholic beverages; for example,
128 whiskey, in which it occurs in consequence of the cupidity of the distillers in carrying on the process after all ethylic alcohol has distilled over."

"Materia Medica," by Bartholow, 5th Ed., p. 471.

"The irritating qualities of fusel oil are discernible even if it be present only to the extent of one-tenth of one per cent. in alcohol."

Oldberg and Wall, under head of "Alcohol Amylieum."

"From the study of the effects of administration of fusel oil to dogs, and from the observations on the two cases of fusel oil poisoning, the following conclusions may be drawn;

"1. Fusel oil when administered to animals, causes the elimination in the urine of combined glycuronic acid, which reduces alkaline, copper, and bismuth, solutions and acts as a levorotation to polarized rays.

129 "2. When taken by men it acts as a profound intoxicant, causing unconsciousness of several hours' duration.

"3. In one of the cases it was followed by symptoms of hemiplegia.

"4. In certain cases, as in case 1, fusel oil is a profound destroyer and causes methemoglobunuria.

"5. In both cases it caused transitory nephritis.

"6. In both patients glycosuria lasting two or three days was produced.

"7. In the two cases there was fairly conclusive evidence that combined glycuronic acid (gepaarte Glukuron saure) was present in addition to glucose."

Flutcher 2 American Medicine, p. 210, (Aug. 10, 1901, p. 213).

"Hence there arises the question of whether drunkenness is not in great measure to be attributed to the fusel oil rather than
130 to the alcohol. That is possible, for we now know by scientific investigations (which, unfortunately, are still too seldom resorted to) that in general and in particular the action of fusel oil is quite extraordinarily more intense than that of alcohol. We know that fusel oil acts from ten to a thousand times as intensely, according to the organ examined.

"I have made my own chemical experiments, and I must say that only he who has not dealt with them can underrate the significance of these constituents. It does not invalidate this position to say that fusel oil is present in only a small amount. In addition to the question of quantity there is that of the degree of activity, and that is very great in some of the fusel constituents. Moreover, it is

not a mere matter of consumption; it goes on immoderately for years. I am very well acquainted with districts in which
131 the ordinary man takes with every meal drink that is by no means absolutely free from fusel oil, but in which the social condition is such that the people are moderate in the matter of all alcoholic drinks, even those that contain fusel oil. There is under such circumstances no danger in the fusel constituents of the dram, which in Germany are kept down to a minimum by legal enactments, and the people grow old and sometimes very old, in a state of health and efficiency."

Alcohol, the Sanction for Its Use, by Dr. J. Starke, pp. 34, 35 and 36.

Shall the physiological aspect of the question have no bearing upon the conclusions of the Court as to the propriety of unjustly discriminating between citizens and between products?

Is there not a great moral responsibility resting upon the
132 Court, when, through sustaining a discriminating tax, they are encouraging the consumption of a distilled spirit which magnifies the evils of intemperance; and can such a discrimination be justified under the pretext of taxing an occupation?

It may be well to remark in this connection that there is no analogy whatever between the tax imposed by the Act before the Court, and that imposed upon the rectifier by the U. S. Internal Revenue Laws, because, within the contemplation of the U. S. Internal Revenue Laws, it is the rectifiers alone who produce whiskey, and the Internal Revenue Laws do not recognize that distillers, as such, produce whiskey, and therefore, in laying a tax upon the occupation of rectifiers, they are not discriminating between the producers of whiskey by different processes.

The rectifiers are the producers of whiskey by a special process, by a process which was originally recognized as the only one which produced whiskey, and the article produced by them, is the
133 article which contains such a small amount of fusel oil as to produce no marked physiological results.

What does the United States Court say upon the subject of the classification of persons, and discrimination between them for the purposes of taxation?

In the case of County of San Mateo *vs.* Southern Pac. R. Co., 13 Fed. 722, loc. cit. 733 (1882), which involved a question of taxation under the law of the State of California, Mr. Justice Field of the Supreme Court of the United States (on circuit) said:

"The Fourteenth Amendment to the Constitution in declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the State which can touch the individual or his property, including among them that of taxation.

* * * * * * *

134 "Unequal exactions in every form, or under any pretense, are absolutely forbidden; and of course unequal taxation, for it is in that form that oppressive burdens are usually laid."

In the case of County of Santa Clara *vs.* Southern Pac. R. R. Co. (9 Sawyer 165), 18 Fed. 385, loc. cit. 399 (1883), in speaking of the Fourteenth Amendment to the Constitution of the United States, Mr. Justice Field of the United States Supreme Court (on circuit) said:

"Unequal taxation, so far as it can be prevented is, therefore, with other unequal burdens, prohibited by the amendment.

* * * * * * *

"As justly said by the Supreme Court of Kentucky, in the celebrated case of Lexington *vs.* McQuillan's Heirs, whenever the property of a citizen is taken from him by the sovereign will and
135 appropriated without his consent to the benefit of the public, the exaction should not be considered as a tax unless similar contributions be exacted by the same public will from such members of the same community as own the same kind of property; and although there may be a discrimination in the subjects of taxation, still persons of the same class and property of the same kind must generally be subjected alike to the same common burden. 9 Dana (Ky.) 513."

In the case of *In re* Grice, 79 Fed. 627 (1897), United States Judge Swayne said:

"All the decisions hold that where a distinction is necessary in classes of citizens under the law, in every instance the classification must be reasonable."

In Fraser *vs.* McConway & Torley Co. 82 Fed. 257 (1897), which involved the validity of a tax imposed by the Legislature of the State of Pennsylvania, the Court said:

136 "The tax is of an unusual character, and is directed against and confined to a particular class of persons.

* * * * * * *

"It imposes upon these persons burdens which are not laid upon others in the same calling and condition.

* * * * * * *

"Now, the equal protection of the laws declared by the Fourteenth Amendment to the Constitution secures to each person within the jurisdiction of a state exemption from any burdens or charges other than such as are equally laid upon all others under like circumstances."

In Railroad & Telephone Cos. *vs.* Board of Equalization, 85 Fed. 302 (1897), United States Judge Clark said:

"The makers of American forms of constitutional govern-
137 ment were by recent lesson fully mindful of the teaching of history that the power to tax is the power to destroy, and that oppressive exactions were generally made under the guise of taxation.

* * * * * * *

"A disregard of just constitutional restraint sets an evil precedent, which does not pass away with the occasion which gives rise to it, but returns in unexpected forms. An unequal and unjust exaction is no longer a tax, but confiscation."

In Gulf, Colo. & Santa Fe R. R. Co. *vs.* Ellis, 165 U. S. 150

(1897), the sole question being as to reasonable classification, Mr. Justice Brewer of the U. S. Supreme Court said:

"Classification must always rest upon some difference which bears a reasonable and just relation to the Act in respect to which
138 the classification is proposed, and can never be made arbitrarily and without any such basis."

And he quoted approvingly from State *vs.* Loomis, 115 Mo. 307, the following:

"It must be evident that differences which would serve for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus, the Legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair.

"Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land.

* * * * * * *

139 "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases, it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

In the case of A. T. & Santa Fe R. R. *vs.* Matthews, 174 U. S. 97, 104 (1899), the Court said:

"The equal protection guaranteed by the constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon those similarly situated.

140 "Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities."

In the case of Connolly *vs.* Union Sewer Pipe Co., 184 U. S. 540 (1902), the Supreme Court of the United States said:

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this."

It is respectfully submitted that the petition for rehearing in this case should be sustained, and a rehearing granted.

W. M. HOUGH,
For Defendant.

T. H. PAYNTER,
W. O. BRADLEY,
DAVID W. BAIRD,
Of Counsel.

141 *Points and Authorities.*

I.

The Act in question violates section 51 of the Constitution of Kentucky, in that the subject of the Act, as declared by the Court to be contained in the body of the Act, is not expressed in the title.

The title of the Act, grammatically considered, is compounded, rectified, adulterated or blended distilled spirits,"

and the words

"in relation to revenue and taxation,"

constitute merely a parenthetical sentence, indicating the general nature of the Act, the scope of which is, however, narrowed, explained and defined by the subsequent and controlling words of the title above quoted.

These words, to-wit, "providing for license taxes on compounded, rectified, adulterated or blended distilled spirits," may be said to be the operative words of the title—alone intended to express
142 the specific object of the Act and must necessarily narrow, explain and restrict the scope of the previous words of the title, viz, "relating to revenue and taxation," and limit and confine those words to a license tax on rectified distilled spirits, and upon nothing else; for, if the words, "relating to revenue and taxation," are not so narrowed and restricted in their meaning and application, then the legislature might under the title of this Act, though specifically providing for a license tax on rectified distilled spirits, have entirely omitted from the Act any tax on distilled spirits, and have embodied in the Act provisions relating to the collection and disbursement of the revenue, regulating and defining the duties of sheriffs, assessors, collectors and other officers in connection therewith; and it could also have imposed license taxes on lawyers, stock breeders and traders; and sundry other similar provisions might have been "coiled in the folds of the bill," and the words "providing for license taxes on compounded, rectified, adulterated or blended distilled spirits," would be wholly superfluous and of no force or effect whatever.

"Revenue and taxation" is a generic phrase, formerly comprehending all forms of taxation.

A "License tax" is one of several forms of taxation, and
143 may be said to be a species of taxation, and when the title to an Act recites that it relates to the genus, but provides specifically for a particular species of tax to be imposed upon one of the numerous subjects of taxation, the subject of taxation so designated, is the only subject which can be constitutionally embraced in the body of the Act.

It is a general rule of construction that when a general and a par-

ticular purpose in relation to the same matter are expressed in an Act, the particular intent prevails.

Section 51, Constitution of Kentucky.
See argument in Petition.
State *vs.* Bengsch, 170 Mo. 81.
Chiles & Thomas *vs.* Munroe, 4 Metc. 71.
Hedger *vs.* Rennaker, 3 Metc. 255.
People *vs.* Beadle, 60 Mich. 22.

II.

The body of the Act imposes a tax upon the business or occupation of rectifying distilled spirits.

144 The title of the Act, taken literally, provides for a tax unknown to the law, to-wit, a license tax on rectified distilled spirits.

It has been decided by this Court, however, that such a title, followed by provisions in the body of the Act imposing tax, similarly described, was not a tax upon the manufacture of distilled spirits, but a tax upon the distilled spirits, themselves.

H. A. Thierman Co. *vs.* Commonwealth, 97 S. W. Rep. 366.

III.

The words "license tax on compounded, rectified, adulterated or blended distilled spirits" have heretofore been construed by this Court to mean simply a tax on compounded, rectified, adulterated or blended distilled spirits, the word "license" being ignored as superfluous and unmeaning; and said words should now be so construed.—*utile per inutile non vitiatur.*

145 H. A. Thierman Co. *vs.* Commonwealth, 97 S. W. Rep. 366.

IV.

There is no authority for levying a license tax on property. Such a tax can only be levied upon some profession, trade, business or occupation.

Section 181, Constitution of Kentucky.

V.

The Court has no authority to amend the title in question, by inserting therein the words "business or occupation of," and changing "compounded" into "compounding," "rectified" into "rectifying," "adulterated" into "adulterating" and "blended" into "blending," thus transforming four adjectives into four participles, so as to make the title read:

"An Act relating to revenue and taxation, providing for license taxes on the business or occupation of compounding, rectifying, adulterating or blending of distilled spirits,"

146 which would be necessary to make the title conform to the body of the Act, as the latter is construed by the Court; nor did the Legislature have in mind any such title; for the Court, in its opinion, has said, the Legislature "had in mind" a license tax on compounded, rectified, adulterated or blended distilled spirits.

Sections 27 and 28, Constitution of Kentucky.

VI.

The Act now before the Court is in violation of the XIV Amendment to the Constitution of the United States, which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws.

The Act before the Court imposes upon the domestic rectifier in Kentucky a license tax of one and one-fourth cents upon every wine gallon of distilled spirits rectified by him.

By the seventh section of the Act, the foreign rectifier may ship into Kentucky and sell rectified distilled spirits, not labeled
147 "Kentucky whiskey," or intended to be so labeled, without the payment of any tax whatever, thus discriminating against the product of the domestic rectifier.

See XIV Amendment Constitution of the U. S.
State *vs.* Hoyt, 71 Vt., p. 59.
State *vs.* Shedrei, 75 Vt., 277.
State *vs.* Montgomery, 94 Me., 192.
State *vs.* Gabrewski, 111 Iowa, 496, l. c. 502.
Quartlebaum *vs.* State, 79 Ala. 1.
Graffty *vs.* City of Rushville, 107 Ind. 502.
Gulf, Colo. & Santa Fe R. R. *vs* Ellis, 165 U. S. 150.
County of Santa Clara *vs.* South. R. R. 9 Sawyer 165, 210.
Ward *vs.* State of Md., 12 Wall. 163.
Lappin *vs.* Dist. of Columbia, 22 App., 68.
Ex Parte Deeds, 75 Ark. 542.

VII.

The tax imposed upon whiskey rectified in other states, and shipped into the State of Kentucky, labeled, or to be labeled
148 "Kentucky whiskey," is invalid, for the reason that a tax is not imposed upon such whiskey as may be falsely so labeled, or intended to be so labeled, but upon all rectified whiskey labeled "Kentucky whiskey," which may be shipped into the State.

The product of the foreign rectifier may have been made from Kentucky whiskey, and may be entitled to be so labeled.

Said provision is, therefore, invalid as a police regulation, and is also invalid as being a regulation of interstate commerce.

Section 8, Art. 1, Constitution of the United States.

The Act in question is invalid because it violates Section 202 of the Constitution of Kentucky, which provides that:

"No corporation organized outside the limits of this State, shall be allowed to transact business within this State on more favorable

conditions than are prescribed by law to similar corporations organized under the laws of this Commonwealth."

149 The construction placed by the Court upon this provision of the Constitution is too restricted. This provision not only covers the case of a foreign corporation engaged in the business of restifying distilled spirits in the State of Kentucky, but covers also any business transacted by a foreign rectifier in the State of Kentucky.

The controlling words of the section are, "shall be allowed to transact business within this State, on more favorable conditions."

A foreign corporation engaged in the business of rectifying outside of the State, which should ship its manufactured product into the State of Kentucky for the purpose of selling the same there, would be transacting business in the State of Kentucky.

The domestic rectifier manufactures his product, not for amusement, but for profit—for sale in the market—and pays a tax upon his product, which the foreign rectifier need not pay, and thus the foreign rectifier transacts business in the State of Kentucky upon more favorable conditions than the Kentucky rectifier.

150 The foreign rectifier does not have to engage in the business of rectifying in the State of Kentucky, in order to "transact business" within the State.

See section 202 of the Constitution of Kentucky.

IX.

The Act under consideration violates the XIV Amendment to the Constitution of the United States, in that it unjustly discriminates against the appellant, as a manufacturer of whiskey by one process, and in favor of the manufacturers of whiskey by another process, and thereby deprives the appellant of the equal protection of the laws.

Fraser *vs.* McConway & Torley Co., 82 Fed. 257-9-60.
Railroad Tax Cases, 13 Fed. 722, 733.
County of Santa Clara *vs.* Rd. Co. 18 Fed. 385, l. c. 399.
Bells Gap R. R. Co. *vs.* Commonwealth of Pa., 134 U. S. 232.
Gulf, Colo. & Santa Fe R. R. Co. *vs.* Ellis, 165 U. S. 150.

151 Connolly *vs.* Union Sewer Pipe Co., 184 U. S. 539.
Cotting *vs.* K. C. Stock Yards Co. etc. 183 U. S. 79.
Union County Nat'l Bank *vs.* Ozan Lumber Co., 127 Fed. 206.
Ozan Lumber Co. *vs.* Union Nat'l Bk. 145 Fed. 344.
State *vs.* Loomis, 115 Mo. 307.
Yick Wo *vs.* Hopkins, 118 U. S. 356.
In re Grice, 79 Fed. 627.
Railroad & Tel. Co. *vs.* Board, 85 Fed. 302.
A. T. & S. R. R. Co. *vs.* Matthews, 174 U S. 97, l. c. 104.

152 And afterwards at a Court of Appeals held at the Capitol at Frankfort on the 28th day of June, 1907, the following order was entered, to-wit:

THE BROWN-FOREMAN COMPANY
v.
COMMONWEALTH.

Franklin.

The Court being sufficiently advised it is considered that the motion and petition of appellant for a rehearing, be and the same is overruled. (Response filed.)

The Response named in foregoing order is as follows:

153 Court of Appeals.

BROWN-FOREMAN COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Response to Petition for Rehearing and Extended Opinion by Judge Hobson.

We are unable to see that the Act in question in any wise conflicts with Sec. 8, or Sec. 10 of Art. 1 of the Constitution of the United States or the 14th Amendment thereto.

The petition for rehearing is overruled.

154 And afterwards on said day at a Court of Appeals held at the Capitol at Frankfort, the following order was entered to-wit:

BROWN-FOREMAN COMPANY
v.
COMMONWEALTH.

Franklin.

Came the appellant by counsel, and on motion the issual of the mandate herein is suspended 20 days.

Be it remembered that on the 28th day of June, 1907, the appellant filed in the office of the Clerk of the Court of Appeals its Assignment of Errors, and which is hereto attached as follows:

155 Supreme Court of the United States.

BROWN-FORMAN COMPANY, Plaintiff in Error,
vs.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

Assignment of Errors.

Plaintiff in error, Brown-Forman Company, by W. M. Hough, T. H. Paynter, W. O. Bradley and David W. Baird, its attorneys,

this — day of June, 1907, shows that in the record of proceedings in the above-entitled cause there is manifest error in this, to-wit:

1. The said Court of Appeals of Kentucky erred in failing to hold that the Act of the General Assembly of the Commonwealth of Kentucky approved March 28, 1906, denied, and denies, to the plaintiff in error, as set forth and claimed in its answer, the equal protection of the laws that is guaranteed it by the Fourteenth Amendment of the Constitution of the United States.

2. The said Court of Appeals of Kentucky erred in failing to hold that the said Act of the General Assembly of the Commonwealth of Kentucky approved March 28, 1906, operated, and operates, as claimed in the answer of the plaintiff in error, to deprive it of its property without due process of law, as guarantied to it by the Fourteenth Amendment of the Constitution of the United States.

3. The said Court of Appeals of Kentucky erred in giving effect to, and in enforcing, the Act of the General Assembly of the Commonwealth of Kentucky approved March 28, 1906, as against the plaintiff in error, and thereby denying to the plaintiff in error the equal protection of the laws guarantied to it by the Fourteenth Amendment of the Constitution of the United States, claimed and pleaded by it in its answer in protection of itself and its property, and in holding that said Act was not repugnant to the Fourteenth Amendment of the Constitution of the United States, and in
156 denying to the plaintiff in error the protection of the said constitutional provision claimed and set up in its answer.

4. That the said Court of Appeals of Kentucky erred in giving effect to, and in enforcing, the Act of the General Assembly of the Commonwealth of Kentucky approved March 28, 1906, against the plaintiff in error, and thereby depriving the plaintiff in error of its property without due process of law guarantied to it by the Fourteenth Amendment of the Constitution of the United States, and in holding that the said Act was not repugnant to said Fourteenth Amendment of the Constitution of the United States, which was pleaded and relied upon by the plaintiff in error in its answer for the protection of itself and its property.

5. That the said court erred in holding that said act does not regulate interstate commerce in violation of sec. 8, art. 1 of the Constitution of the United States.

6. That said court erred in holding that said act does not violate the second clause of sec. 10, art. 1 of the Constitution of the United States.

Wherefore, the plaintiff in error prays that a judgment of the said Court of Appeals of Kentucky may be reversed by this Honorable Court, and this cause remanded to said Court of Appeals, with directions to send down its mandate to the Franklin Circuit Court directing it to dismiss the petition against the plaintiff in error.

WM. M. HOUGH,
T. H. PAYNTER,
W. O. BRADLEY,
DAVID W. BAIRD,
Counsel for Plaintiff in Error.

156½ [Endorsed:] Supreme Court of the United States. Brown-Forman Company *vs.* Commonwealth of Kentucky. Assignment of Errors. Filed before me this June 28th, 1907. Ed. C. O'Rear, Chief Justice, Court of Appeals of Ky. Filed Jun- 28, 1908. J. Morgan Chinn, C. C. A.

157 And on said date there was filed in the office of the Clerk of the Court of Appeals, the Writ of Error from the Supreme Court of the United States, and the order allowing same and which are hereto attached as follows:

158 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Court of Appeals of Kentucky, Greeting:

Because in the record of proceedings, as also in the rendition of the judgment, of a plea which is in the said Court of Appeals of the State of Kentucky, before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between Brown-Forman Company, Appellant in the aforesaid Court and Plaintiff in Error, and the Commonwealth of Kentucky, Appellee in the aforesaid Court and Defendant in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Brown-Forman Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at Washington on the 27th day of

158½ July, A. D. 1907, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 28th day of June,

A. D. 1907, and of the Independence of the United States the 131st year.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

Attest:

WALTER G. CHAPMAN,
Clerk of the Circuit Court of the United States for the Eastern District of Kentucky, at Frankfort.

Allowed by
ED. C. O'REAR,
Chief Justice of the Court of Appeals of Kentucky.

[Endorsed:] Filed Jun- 28, 1907. J. Morgan Chinn, C. C. A.

159 Court of Appeals of Kentucky.

BROWN-FORMAN COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Upon motion of David W. Baird, attorney for appellant, Brown-Forman Company, and upon filing a petition for a writ of error and an assignment of errors, all of which has been done, it is now ordered that a writ of error be and hereby is allowed to have reviewed in the Supreme Court of the United States, the judgment heretofore entered herein, and that the amount of bond on said writ of error be and hereby is fixed at one thousand dollars, to operate as a supersedeas and to stay further proceedings on the judgment herein until the said Supreme Court of the United States shall have determined the said writ.

ED. C. O'REAR,
Chief Justice of the Court of Appeals of the State of Kentucky.

[Endorsed:] Filed Jun- 28, 1907. J. Morgan Chinn, C. C. A.

160 And on said date there was filed in the office of the Clerk of the Court of Appeals, the original Citation, and proof of service endorsed thereon, and which is attached hereto as follows:

161 Court of Appeals of Kentucky.

BROWN-FORMAN COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Citation.

UNITED STATES OF AMERICA:

The President of the United States to the Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Kentucky, wherein The Brown-Forman Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ mentioned, should not be corrected and why speedy justice should not be done *by* the parties in that behalf.

Witness the Honorable Edward C. O'Rear, chief justice of the court of appeals of Kentucky, this 28th day of June in the year of our Lord one thousand nine hundred and seven.

ED. C. O'REAR,
Chief Justice of the Court of Appeals of Kentucky.

I accept the service of this citation for defendant in error this 28th day of June, 1907.

N. B. HAYS, *Att'y Gen.*,
Per MORRIS.

[Endorsed:] Filed Jun- 28, 1907. J. Morgan Chinn, C. C. A.

162 And on said date there was filed in the office of the Clerk of the Court of Appeals, a Writ of Error Bond, and which is in words and figures as follows, to-wit:

163 Court of Appeals of Kentucky.

BROWN-FOREMAN COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Know all men by these presents that The Brown-Foreman Company, principal, and David W. Baird surety, are held and firmly bound unto the Commonwealth of Kentucky in the sum of One Thousand ($1000) Dollars to be paid to the obligees herein; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 28th day of June, 1907.

Whereas the above-named Brown-Foreman Company hath prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the Court of Appeals of Kentucky:

Now, therefore, the condition of this obligation is such that if the above-named Brown-Foreman Company shall prosecute its said Writ of Error to effect and answer all damages and costs if it
164 shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force.

BROWN-FOREMAN COMPANY,
By DAVID W. BAIRD.
DAVID W. BAIRD.

The above and foregoing bond is approved, this 28th day of June, 1907.

ED. C. O'REAR,
Chief Justice of the Court of Appeals of Kentucky.

165 COMMONWEALTH OF KENTUCKY,
The Court of Appeals, ss:

In obedience to the commands of the within Writ of Error, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the case named in said Writ, with all things concerning the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal. Done at the Capitol at Frankfort, this the 6th day of July, 1907.

[Seal Kentucky Court of Appeals.]

J. MORGAN CHINN,
Clerk of the Court of Appeals of Ky.

Endorsed on cover: File No. 20,803. Kentucky court of appeals. Term No. 139. Brown-Forman Company, plaintiff in error, *vs.* Commonwealth of Kentucky. Filed July 17th, 1907. File No. 20,803.

22

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 6.

BROWN-FORMAN COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

W. M. HOUGH.
LEVI COOKE.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 6.

BROWN-FORMAN COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

THIS COURT IS NOT BOUND BY THE JUDGMENT OF THE COURT OF APPEALS.

Counsel for the defendant in error, in argument and in their brief subsequently filed, urge that this court should adopt the interpretation of the Kentucky Court of Appeals, holding that the law in issue taxes the occupation of compounding, rectifying, adulterating, or blending distilled spirits.

It is immaterial whether the tax be *named* an occupation tax, or a property tax; if it works the discrimination claimed by the plaintiff in error, it falls. This court may follow the construction of a State law by a State court *as to the meaning*

of the language of the State legislature, but *this court,* following such meaning, *will determine for itself the constitutional effect of the law so construed.*

Whether the act be construed as exacting a tax on occupation, or on property, it has the effect of imposing a charge on the distilled spirits expressly designated, and must be tested constitutionally as imposing such charge on the goods.

The Commonwealth's Brief Substantially Admits that the Act is Discriminatory.

Defendant in error, at page 13 of its brief, alleges the existence of a wholesaling license tax against foreign rectifiers, which it contends counteracts and equalizes, by way of classification, the tax on domestic rectifiers' goods. The brief says:

> "It is true the foreign rectifier may ship his product into Kentucky and sell it, but in order to do so he must pay a State license tax of from $100 to $300 per year, according to the quantity sold. (See Ky. Acts, 1906, pp. 204-205.) *So by the laws of the State the business of wholesaling rectified spirits by foreign dealers is regulated by an annual tax, while that of the domestic rectifier is regulated by a tax on the output, and this different classification is legitimate."*

The italics are ours. Defendant in error overlooks the fact that by the provisions of the very law cited *domestic rectifiers pay the same graduated wholesale license as is imposed on foreign rectifiers.*

Since the wholesaling tax is equal on foreign and domestic rectifiers and blenders, the "legitimate classification" does not exist, and the discrimination of one and one-quarter cent per gallon on the domestic goods stands unrelieved, even by the classification defendant erroneously urges as tending theoretically to secure equality. It is submitted that

the Commonwealth concedes that the tax, unless in some way set off, constitutes inequality.

To make the excess domestic tax quite plain, the following table is shown:

Taxes Paid by Domestic and Foreign Rectifiers and Blenders on Goods Sold and Offered for Sale in Kentucky.

Domestic.		Foreign.
Ad valorem property tax.	(Equal)	Ad valorem property tax.
Wholesale license tax.	(Equal)	Wholesale license tax.
One and one-fourth cents on each gallon handled.	(Unequal)	

Policy of the Act.

Counsel for defendant in error conceded that the purpose of the act is to mulct rectified and blended whiskies as against straight whisky.

There is no proof in the record to sustain argument of counsel to the effect that the words "compounded, rectified, adulterated or blended," are synonymous, even in the parlance of Kentucky traders, and that for the purposes of this act, each means "adulterated" or the equivalent. In the absence of special meaning proved, the words must be taken in their ordinary sense.

As a matter of fact, many straight whiskies, that is whiskies that have not been subjected to any rectification, and that therefore contain the impurities created during the fermentation of the grain, are really adulterated whiskies. One kind of adulteration in whisky is excess of fusel oil, and all unrectified whisky contains fusel oil in excess, since the only means of removal of fusel oil is by some process of rectification.

In the report of the Physiological Section of the Committee of Fifty to Investigate the Liquor Problem (Houghton, Mifflin & Company, 1903), page 327, it was said:

"Among the materials which may occur naturally in excess or be added artificially, and are to be considered as more or less injurious adulterants, are:
* * *
"*In whisky, fusel oil and water in excess.*"

It will thus be seen that if adulteration alone was aimed at by the act, the measure is faulty as limiting the operation of the tax only to goods in the hands of the rectifiers and blenders, while the product of the distilleries, which may be truly adulterated in the sense that it contains excess fusel oil, escapes the tax so long as it is not handled by the rectifier, albeit the rectifier by handling such product might make purer whisky of it.

The court is respectfully referred to Appendix A of the first brief of plaintiff in error and to record pages 29 *et seq.* for matter bearing on the questions of trade fact involved, and it is urged that the constitutional merits of the case should not be obscured or prejudiced by inaccurate terms or unwarranted assumptions of fact employed (it is submitted with all respect) by the court below and by counsel for the defendant in error.

Federal Questions Properly Raised.

All Federal questions relied upon by plaintiff in error were properly raised in the courts below and were there decided adversely to plaintiff in error.

Defendant in error cannot be heard to deny that the Brown-Forman Company handles blended and rectified distilled spirits within the State of Kentucky, the Commonwealth having so alleged in its petition, and that one fact is all that is necessary to set in operation the constitutional prohibitions urged and relied upon by plaintiff in error.

The Seventh Section of the Act.

Defendant in error misapprehends the Brown-Forman Company's attitude on section 7 of the act. The company is not interested in shipping foreign spirits into Kentucky marked as Kentucky spirits or product or to be so marked. Plaintiff in error merely argues that the subjection of such kind of foreign spirits to tax under the act indicates, by the maxim *expressio unius est exclusio alterius,* that all other foreign spirits of the kinds designated may enter Kentucky for sale therein free of the tax.

Plaintiff in error is not interested in the designation of its goods as *Kentucky* goods. There is no proof in the record that the Brown-Forman Company marked any of its goods as Kentucky wares, or, even as to spirits entirely the product of Kentucky distilleries, traded on the name of the State in connection therewith.

If, as suggested by defendant in error, the act is intended to tax and thereby tend to suppress the use of the name "Kentucky" on the designated kinds of spirits, it only emphasizes the ulterior purpose of the tax as a mulct and discrimination against rectified and blended spirits handled in the State of Kentucky, in favor of unblended and unrectified Kentucky spirits, and in favor of all spirits, of whatever kind and designation, of other States.

Amount of Tax Collected is Immaterial.

The Commonwealth's suggestion (Brief, p. 3) that it will be liable for large sums collected under this law is without merit. It is a fallacious argument in favor of the validity of a tax to urge that much money has been collected under it. This fact should rather militate against the measure, if it be unlawful, than in its favor.

Plaintiff in error stands ready to pay all just taxes, however onerous, assessed to it by the State of Kentucky. But it prays relief and protection from unequal and discriminatory taxes levied as a mulct upon it and its goods, in favor of others and their goods.

Respectfully submitted,

W. M. HOUGH.
LEVI COOKE.

SUPREME COURT OF THE UNITED

October Term, 1909.

No. 6.

BROWN-FORMAN COMPANY, PLAINTIFF IN

vs.

COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

W. H. Houser,
Lucy Cooke,
Attorneys for Plaintiff in Error.

Houser, Houser & Walker and
A. B. Hayes,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 6.

BROWN-FORMAN COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

Proceedings Below.

Under the writ of error in this case a review is asked by this court of a decision of the Court of Appeals of the Commonwealth of Kentucky, in which it was held that an act of the General Assembly of that State, entitled—

> "An act relating to revenue and taxation, providing for license taxes on compounded, rectified, adulterated or blended distilled spirits, known and designated as single-stamp spirits, and providing penalties for violation of its provisions,"

approved March 26, 1906, did not impose a tax on property, and was not violative of the "due process" and "equal protection" clauses of the Fourteenth Amendment and article 1,

section 8, clause 3, and article 1, section 10, clause 2 of the United States Constitution.

The proper officers of the Commonwealth of Kentucky filed, in the Franklin circuit court of that State, a petition against the Brown-Forman Company, alleging that it was indebted to plaintiff in the sum of two hundred and one dollars and twenty-five cents ($201.25) under the act referred to, in that said company had "compounded, rectified, adulterated, or blended distilled spirits from what is known and designated as *double-stamp* spirits, * * * but had failed and refused and still fails and refuses to pay the tax due thereon" (printed Record, pp. 1 and 2).

The Brown-Forman Company demurred to the petition, on the ground that *double-stamp* spirits were not taxable under the act in question, and also attacked the validity of the act under various provisions of the constitution of the State of Kentucky and the Constitution of the United States (Record, pp. 2 and 4).

The demurrer to the petition was overruled, whereupon the Brown-Forman Company answered (Record, p. 4), alleging:

> 1. That by the system of marking and stamping distilled spirits under the Internal Revenue laws, all distilled spirits in the United States are known either as *double-stamp* spirits, by reason of the fact that they carry two stamps under the Internal Revenue laws, or as *single-stamp* spirits, by reason of the fact that they carry but a single stamp under the Internal Revenue laws; and that the Brown-Forman Company had paid the tax of 1¼ cents upon every gallon of *single-stamp* spirits which it had compounded, rectified, adulterated or blended, but had refused to pay any tax upon the gallons of *double-stamp* spirits used by it in compounding, rectifying, and blending, as the law did not provide for any tax to be paid upon *double-stamp* spirits used by it in compounding, rectifying, and blending.
>
> 2. That the act under which the action was brought was unconstitutional by virtue of various provisions

of the constitution of the State, which were set forth, and also in conflict with section 8, article 1, and section 10, article 1 of the Constitution of the United States, and the Fourteenth Amendment thereof (Record, pp. 4-6).

The Commonwealth demurred to the answer (Record, p. 6), the court sustained the demurrer, and the Brown-Forman Company refusing to plead further, judgment was entered in favor of the Commonwealth for the amount sued for, to wit, two hundred and one dollars and twenty-five cents ($201.25), with interest and costs (Record, p. 7).

The case was thereupon appealed to the Court of Appeals of Kentucky, where the judgment of the circuit court was affirmed. The opinion of the Court of Appeals by Judge Hobson is printed in full in the transcript (Record, pp. 9 *et seq.*).

The Brown-Forman Company filed a petition for rehearing (Record, pp. 16 *et seq.*), which was by the Court of Appeals overruled (Record, p. 47), and the case comes to this court by writ of error.

Statement.

The Provisions of the Act.

The act of the General Assembly of Kentucky under consideration in this case is entitled:

> "An act relating to revenue and taxation, providing for license taxes on compounded, rectified, adulterated or blended distilled spirits, known and designated as *single-stamp* spirits, and providing penalties for violations of its provisions,"

and consists of eight sections, which are substantially as follows:

The first section provides that every corporation, association, company, copartnership, or individual engaged in the

State in the business or occupation of compounding, rectifying, adulterating, or blending distilled spirits, known and designated as *single-stamp* spirits, shall pay to the Commonwealth a license tax of one and one-fourth cents upon every wine gallon of such compounded, rectified, blended, or adulterated distilled spirits.

The second section makes it the duty of persons engaged in compounding, rectifying, adulterating, or blending distilled spirits designated as *single-stamp* spirits to deliver to the auditor of public accounts at intervals of six months a sworn report stating the name and place of business and the number of wine gallons of compounded, rectified, adulterated, or blended distilled spirits known and designated as *single-stamp* spirits made during the six months then ended, and such other information as the auditor may require, and to pay into the State treasury the amount of taxes due the State imposed by the first section.

The third section requires that before any corporation, association, company, copartnership or individual shall engage in the business or occupation of compounding, rectifying, adulterating or blending in the State, the auditor of public accounts shall be given notice of the intention of those named to engage in such business or occupation, which notice shall contain the name and place of residence of those intending to engage in the business, and the approximate number of wine gallons of such compounded, rectified, adulterated or blended spirits the applicant contemplates making prior to the first date at which he is required to report the number of gallons made to the auditor of public accounts.

The fourth section provides that upon receipt of such notice by the auditor of public accounts he shall issue to each applicant a certificate showing that he has complied with the act, and said section makes it a misdemeanor subject to indictment in the Franklin circuit court for any corporation, association, company, copartnership or individual to engage in the business of compounding, rectifying, adulterating or blending distilled spirits known and designated

as *single-stamp* spirits without first receiving such certificate, the punishment being a fine of not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000).

The fifth section provides that upon payment of the license tax to the treasurer through the auditor of public accounts authority to continue in the business or occupation of compounding, rectifying, adulterating or blending distilled spirits known and designated as *single-stamp* spirits shall be issued to the tax-payer if such authority is desired for six months or until the date provided in this act when reports shall be made.

The sixth section provides that any compounder, rectifier, adulterator or blender liable for taxes imposed by the act who shall fail or refuse to make and deliver to the auditor of public accounts a sworn statement containing all the facts required to be reported and to pay the license tax as required by the act shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars ($50) nor more than one hundred dollars ($100) for each day of such failure or refusal, to be recovered by indictment in the Franklin circuit court, and shall forfeit his right to engage in said business in the State.

The seventh section provides that any corporation, association, company, copartnership or individual who shall ship any compounded, recitified, blended or adulterated distilled spirits known and designated as *single-stamp* spirits into the State for the purpose of labeling, branding, marking or stamping the same as Kentucky whisky, product or spirits, or which, before shipment into the State, shall have been, or may thereafter be, labeled, branded, marked or stamped as Kentucky whisky, product or spirits, shall be deemed compounders, rectifiers, blenders or adulterators under the provisions of the act, and shall pay the tax imposed by the act on compounders, rectifiers, blenders or adulterators of such spirits in this State, and shall make the report required to the auditor of public accounts. Violation of this section is

made a misdemeanor subject to fine in any sum of not less than five hundred dollars ($500) nor more than one thousand dollars ($1,000), each shipment to constitute a separate offense, and the Frankin circuit court is given sole jurisdiction.

The eighth section repeals all laws or parts of laws in conflict with the act.

The act is set forth in full in the opinion of Judge Hobson, of the Kentucky Court of Appeals (Record, pp. 9-11), and is printed as *Appendix B* to this brief.

The Construction of the Act.

It was contended by the Brown-Forman Company in the courts below that the act in question was in express terms limited and confined to spirits compounded, rectified, adulterated or blended, known and designated as *single-stamp* spirits, which precise phrase is employed in the title of the act, and five times in the body of the act, as descriptive of the spirits upon which the tax is to be paid, and did not apply to, and by no recognized rule of construction could be held to apply to, or include spirits bearing double stamps. The defendant's plea of exemption from the provisions of the act, though the facts upon which said plea was based were confessed by the demurrer, was denied both by the Franklin circuit court and by the Kentucky Court of Appeals, and the defendant was adjudged to be in default, as to taxes on *double-stamp* spirits, which it was contended are not subject to taxation under the act.

State Constitutional Questions.

The validity of the act was further questioned by the Brown-Forman Company under various provisions of the constitution of the State of Kentucky, which are fully set forth in the answer (see Record, pp. 4, 5, and 6), filed by

the Brown-Forman Company, and which were considered by the Court of Appeals of Kentucky in its opinion; while the rulings of the court thereon cannot be assigned as error in this tribunal, because such rulings were in violation of the constitution of Kentucky, yet a knowledge of said rulings serves to emphasize the wisdom and demonstrate the inestimable value of the Fourteenth Amendment.

Federal Constitutional Questions.

The validity of the act under the Federal Constitution was assailed on the following grounds:

I.

The act violates the Fourteenth Amendment to the Constitution, wherein it provides that no State shall deprive any person of liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

II.

The act violates article 1, section 8, clause 3, of the Constitution, wherein it provides that Congress shall have power to regulate commerce with foreign nations, among the several States, and with the Indian tribes.

III.

The act violates article 1, section 10, clause 2, of the Constitution, wherein it provides that no State shall, without the consent of Congress, lay any imposts or duties, on imports or exports, except what may be absolutely necessary for executing its inspection laws.

Adverse Rulings Below.

The Court of Appeals of Kentucky considered the several objections made to the validity of the proceedings in the Franklin circuit court, and its own judgment, based upon

the language of the act, and upon the constitution of the State of Kentucky, and the Constitution of the United States, and the Fourteenth Amendment thereof, and overruled each of said objections, and sustained the validity of the tax imposed by the act, and affirmed the judgment against the defendant below, the plaintiff in error here.

The grounds above set forth under the title of "Federal Constitutional Questions," upon which the validity of the tax imposed by the act in question was assailed, are embodied in the assignment of errors (Record, pp. 47 and 48).

ARGUMENT AND AUTHORITIES.

It was contended in the Kentucky courts that the title of the act now before the court, contemplated and provided for *a tax upon property,* and that the Court of Appeals of Kentucky had so decided in the case of *Thierman vs. Commonwealth,* 123 Ky. Rep., 740, *where the same identical title was before the court for construction.* Plaintiff in error insisted that the construction placed upon the title in this case is not in harmony with the construction placed by the court upon the same title in the Thierman case.

As set forth in the assignment of errors, the Federal questions to be considered are those arising, *first,* under the Fourteenth Amendment, *second,* under the commerce clause, and *third,* under the prohibition against imposts upon exports and imports.

The Fourteenth Amendment.

Upon a writ of error to review the judgment of the highest court of a State, upon the ground that such judgment is against a right claimed under the Constitution of the United States, this court is not bound by the State court's construction of a statute of the State. *Scott vs. McNeal,* 154 U. S., 34.

It is expressly held in that case that the Fourteenth Amendment of the Constitution ordains that no State shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law. These prohibitions extend to all acts of the State, whether through its legislative, its executive, or its judicial authority. * * * And in every such case, this court must decide for itself the true construction of the statute. Citing in support of the rule thus announced, *Huntington vs. Attrill,* 146 U. S., 657, 683; *Mobile & O. R. Co. vs. Tenn.,* 153 U. S., 486.

This court, elsewhere, considering the restrictions upon the States imposed by the Fourteenth Amendment, has said that what are called the police powers of the State,

> "were not included in the grants of power to the General Government, and therefore were reserved to the States when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the States to the contrary notwithstanding, a statute of the State, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a State enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."
>
> Connolly *vs.* Union Sewer Pipe Co., 184 U. S., 540, 558.

The power of this court, therefore, under the Fourteenth Amendment, extends to all departments of the State government, and a State statute which, in the opinion of this court, deprives a citizen of the equal protection of the laws cannot be upheld because the Supreme Court of the State has sanctioned the same as a valid enactment; and the authority of this court to determine for itself whether or not the act under consideration is in violation of the Fourteenth Amendment is firmly established.

From the time that Chief Justice Marshall announced the maxim in *McCullough vs. Maryland,* 4 Wheat., 316, that "the power to tax involves the power to destroy" the proposition has not been questioned that a State may not, by an arbitrary exercise of its taxing function, single out for oppression a particular person or class of persons within its domain, in violation of the Constitution.

It was held in the United States circuit court for the district of California in *County of Santa Clara vs. The Southern Pacific R. R. Co.,* 18 Fed., 385, that:

> "The Fourteenth Amendment of the Constitution, in declaring that no State shall deny to any person within its jurisdiction the 'equal protection of the laws,' imposes a limitation upon the exercise of all the powers of the State which can touch the individual or his property, including that of taxation."

The language of Mr. Justice Field in that case, in respect to the operation of the Fourteenth Amendment upon the taxing power of a State, is so apposite to the case at bar as to justify its reproduction. He said, *l. c.*, 398-399:

> "With the adoption of the amendment the power of the States to oppress any one under any pretense or in any form was forever ended; and henceforth all persons within their jurisdiction could claim equal protection under the laws. And by equal protection is meant equal security to every one in his private rights—in his right to life, to liberty, to property, and to the pursuit of happiness. It implies not only

that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances. This protection attends every one everywhere, whatever be his position in society or his association with others, either for profit, improvement, or pleasure. It does not leave him because of any social or official position which he may hold, nor because he may belong to a political body, or to a religious society, or be a member of a commercial, manufacturing, or transportation company. It is the shield which the arm of our blessed Government holds at all times over every one, man, woman, and child, in all its broad domain, wherever they may go and in whatever relations they may be placed. No State—such is the sovereign command of the whole people of the United States—no State shall touch the life, the liberty, or the property of any person, however humble his lot or exalted his station, without due process of law; and no State, even with due process of law, shall deny to any one within its jurisdiction the equal protection of the laws.

"Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the amendment. There undoubtedly are, and always will be, more or less inequalities in the operation of all general legislation arising from the different conditions of persons from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality; or a scheme, if not so devised, necessarily producing that result. Absolute equality may not be attainable, but gross and designed departures from it will necessarily bring the legislation authorizing it within the prohibition. The amendment is aimed against the perpetration of injustice, and the exercise of arbitrary power to that end. The position that unequal taxation is not within the scope of its prohibitory clause would give to it a singular meaning. It is a matter of history that unequal and discriminating taxation, leveled against special classes,

> has been the fruitful means of oppressions, and the cause of more commotions and disturbance in society, of insurrections and revolutions, than any other cause in the world. It would, indeed, as counsel in the San Mateo case ironically observed, be a charming spectacle to present to the civilized world, if the amendment were to read, as contended it does in law: 'Nor shall any State deprive any person of his property without due process of law, *except it be in the form of taxation;* nor deny to any person within its jurisdiction the equal protection of the laws, *except it be by taxation.*' No such limitation can be thus ingrafted by implication upon the broad and comprehensive language used. The power of oppression by taxation without due process of law is not thus permitted; nor the power by taxation to deprive any person of the equal protection of the laws."

Plaintiff in error does not contend that the provisions of the Fourteenth Amendment were intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways; nor that the amendment was intended to compel a State to adopt an iron rule of equal taxation. *Adams Express Co. vs. Ohio State Auditor*, 165 U. S., 194.

But it is urged that the act under consideration, in singling out and subjecting to taxation the spirits therein mentioned, creates an unjust discrimination against Kentucky rectifiers and blenders included within the provisions of the act, in favor of the three other classes engaged in the same business, to wit: (1) Kentucky distillers who vend unrectified and unblended spirits; (2) distillers of other States, or countries, who vend in Kentucky unrectified and unblended spirits, and (3) rectifiers and blenders of other States, or countries, who vend in Kentucky untaxed rectified or blended spirits, in direct competition with the spirits of Kentucky rectifiers, or blenders, subject to the tax.

THE TAX IS A PROPERTY TAX.

With a view, doubtless, of endeavoring to make the act appear to be a regulation of a business or vocation, instead of an act imposing a tax on property, it is provided that rectifiers and blenders shall at a certain time in each year obtain, from the auditor of public accounts, a certificate authorizing such persons to do business. The application for such certificate is required to state "the approximate number of wine gallons of such compounded, rectified, adulterated or blended spirits the applicant contemplates making prior to the first date at which he is required to report *the number of gallons made* to the auditor of public accounts." Thereafter each applicant is required to make a sworn report to the auditor of public accounts, "stating the name, place of business, and number of wine gallons of compounded, rectified, adulterated or blended distilled spirits known and designated *as single-stamp spirits* made during the six months then ended, and such other information as the auditor may require, and at the same time pay into the State treasury, through the auditor, the amount of taxes due the State as herein provided." (See copy of the act set forth in full, Record, pp. 9, 10, 11, and in Appendix B hereto.)

It will be seen from these provisions that the prime purpose of the act is the levying of a tax; not as an incident to the right to do business, but solely for the purposes of revenue. The certificate required, if useful at all, is useful only to enable the auditor to determine who will be required to pay the tax and the approximate amount that should be paid by each.

The meaning and purpose of a legislative enactment cannot be determined, as was attempted by the Kentucky Court of Appeals in this case, by eliminating or disregarding a word here or a word there, but by taking the title and the entire body of the act and construing it as a whole, giving the lan-

guage used a reasonable interpretation as applied to the subject of legislation.

If the tax, as we contend, is laid upon the goods, and is a revenue measure, then it must, to avoid a conflict with the Fourteenth Amendment in regard to the equal protection of the laws, apply equally to all of the general class engaged in the same business. It is only necessary to analyze the act to determine that its purpose was revenue, and the subject from which the revenue was to be derived was the spirits or goods designated in the act. The title of the act, which the Constitution of the State requires shall express its purpose, is as follows:

> "An act relating to revenue and taxation, providing for license taxes on compounded, rectified, adulterated or blended distilled spirits, known and designated as single-stamp spirits, and providing penalties for violations of its provisions."

In the body of the act, the first section provides that those dealing in the spirits therein designated shall pay to the Commonwealth of Kentucky a license tax of one and one-fourth cents *upon every wine gallon* of such designated spirits.

The second section requires the rectifier or blender to state the place of business and the number of wine gallons of designated spirits made during the six months then ended * * * and at the same time to pay into the State treasury, through the auditor, the amount of taxes due the State as provided by the act.

The third section requires persons, before dealing in the spirits designated in the act, to give notice of their intention to engage in such business or occupation, and such information shall not only contain the name and place of business of the applicant, but "the approximate number of wine gallons of such designated spirits the applicant contemplates making prior to the first date at which he is required to

report the number of gallons made to the auditor of public accounts."

The fourth section requires the auditor of public accounts upon the notice received from an applicant, to issue him a certificate showing that he has complied with the act.

The fifth section as a condition precedent to the continuance of the applicant in business, requires him to pay the license tax provided by the act, whereupon the auditor authorizes him to continue in business.

The sixth section prescribes a penalty for failure or refusal to pay the tax.

The seventh section simply makes it an offense if a rectifier or blender outside of the State ships his product into the State and marks or stamps the same Kentucky whisky, no penalty being prescribed and no tax being imposed if he simply ships the product into the State without so labeling it.

It thus clearly appears from the title of the act and from the first section of the act, which is the only section that designates the amount of the tax and the subject of the tax, that the tax is one *on* each wine gallon of distilled spirits; and that the tax is also one for revenue is amply shown by the decision of the Kentucky Court of Appeals in the case of *Thierman vs. Commonwealth*, 123 Ky., 740.

In the case of *Welton vs. Missouri*, 91 U. S., 275, this court held that a license tax upon a sale of goods was in effect a tax upon the goods. Following the rule in *Brown vs. Maryland*, 12 *Wheat.*, 425, this court refused to adopt the view of the Supreme Court of Missouri that the license charge could be maintained *as a tax upon a calling*, and said:

> "So, in like manner, the license tax exacted by the State of Missouri from dealers in goods which are not the product or manufacture of the State, before they can be sold from place to place within the State, *must be regarded as a tax upon such goods themselves.*"

See to the same effect—

Brennan vs. Titusville, 153 U. S., 289.
Cook vs. Pennsylvania, 97 U. S., 566.
Tiernon vs. Rinker, 102 U. S., 123.

Even if the charge sought to be put upon the spirits designated in the act was exacted as a condition precedent to their production, it is clear that the charge would still be not upon the business of producing, but upon the goods produced, and even if technically the tax could be deemed an occupation tax, it would under the doctrine of the cases last cited be invalid as operating through the occupation directly upon the goods produced or handled in the occupation.

That the opinion of the Kentucky Court of Appeals is erroneous in attempting to construe this act as a sort of occupation taxing regulation measure (*vide* opinion, Record, p. 15) is established not only by the terms and effect of the act as we have shown, but by the judgment of the Kentucky Court of Appeals itself in the case of *Thierman vs. Commonwealth,* 123 Ky., 740. In that case the Court of Appeals construed an act of the General Assembly of Kentucky approved March 24, 1904 (Acts of Kentucky 1904, p. 255), which was intended to accomplish the same purpose as the act under consideration, viz., the levying of a tax upon the same class of spirits. The distinctions between the two acts are simply in the manner in which the amount of taxes shall be ascertained and the fact that the act under consideration requires a certificate of those engaging in the business of blending and rectifying. In other respects the acts are practically the same *and the titles are identical.*

The act of 1904 was held unconstitutional by the Court of Appeals of Kentucky on the ground that it was a revenue measure which had originated in the Senate instead of the House of Representatives, as required by section 47 of the State constitution. Other constitutional objections to the act were not considered, but the reasoning by which the court found that the act, notwithstanding the term "license

taxes" employed in the title, was a revenue measure and not a police measure, may be applied with equal force to the act under consideration to show it to be a revenue and not a police measure.

The act now under consideration properly originated in the House of Representatives, and, while the constitutional objection which was fatal to the act of 1904 was thereby avoided, the body of the present law, more distinctly than its predecessor, makes the charge imposed a property tax rather than a license upon an occupation or a police measure.

In laying down the rule to be observed in ascertaining whether an act is one for revenue or an exercise of the police power, the court in the Thierman case said:

> "If it (the act) has the twofold purpose of raising revenue and incidentally to regulate the business from which the revenue is derived, with revenue as its primary purpose, it is in violation of the provision of the constitution, and is therefore unconstitutional and void. If, on the other hand, its purpose is *to regulate the manufacture and use of rectified spirits*, with revenue as a mere incident, then it is not in violation of the constitution and should be upheld."

This declaration is in keeping with what is said by Judge Cooley on Taxation, second edition, page 587:

> "Only those cases where regulation *is the primary object* can be specially referred to the police power."

The reports required by the act to be made to the auditor were manifestly intended for the purpose of determining the amount of the tax to be paid into the State treasury. As was further said by the court in the Thierman case:

> "The bill does not seek to control the quality of the manufactured product or in anywise to regulate the sale; but the State through the provisions of this bill, is seeking but one purpose, that of collecting a tax upon the volume of the business done by the rectifier. He may make any kind of liquor he

> chooses, good or bad; he may sell in any way he can, to any person able to buy, and in any quantity, and in these particulars the State has no interest whatever so far as this bill is concerned."

In response to the argument by the State that the act of 1904 was a police measure, operating by way of license, the Court of Appeals of Kentucky, citing the cases of *United States vs. Mayo*, 26 Fed. Cas., 1231; *United States vs. James*, 14 Blatchf., 207, and *Perry County vs. R. R.*, 58 Ala., 546, used the following language, *l. c.*, 752:

> "Tested by these rules, which are sound in principle, the bill before us cannot be regarded in any other light than as a bill for revenue. It does not seek to regulate in any way, shape, or form *the manufacture or sale of liquor*. It seeks nothing of the manufacturer but the payment of the tax."

Regarding the use of the word "license" in the title and body of the act, the court in the Thierman case said, *l. c.*, 751:

> "Appellee has cited numerous authorities of this and other States illustrative of the extent to which the police power of the State has been carried by legislative enactment. But he has not cited any authority in point in which the law in question *did not require the granting of a license as a condition precedent to engaging in the business;* such as the sale of liquors by retail or by barrel-house men, the peddling of goods, the operation of foreign insurance companies through local agents, and the licensing of lawyers. The courts have held, and we think properly so, that all such acts are police regulations, and the revenue derived from their enforcement is a mere incident—the main purposes and object of the acts in question being the protection of the people in their health and morals and against impostors and fakes; *and in each and every instance there was required, as a condition precedent to engaging in the business, the payment of a license fee and the granting of a license as an evidence to the public that the holder*

> *had complied with the requirements of the law.* It is this feature which requires of the applicant compliance with certain rules and regulations as a condition precedent to engaging in any particular line of business that is characteristic of all the measures which may properly be designated as police regulations."

The act under consideration contains no provisions for licensing the business before it is commenced. It is required that notice shall be given of intention to engage in the business, and of the amount of spirits expected to be produced, and that the auditor of public accounts shall thereupon issue to applicants certificates showing that they have complied with the act. This cannot be reasonably construed as a policing of the business, and the only purpose effected by these provisions of the act is that of securing an accurate return at the end of each period of six months upon the goods handled during that period.

The effect of the foregoing requirements of the act in controversy is quite similar to that secured by *sections 3259* and *3260, R. S. U. S.,* by which those engaged in the business of distilling under the United States Internal Revenue laws are required to give certain notices to the collector of internal revenue in order that the latter may properly collect the tax on distilled spirits produced by such distillers under the taxing provisions for distilled spirits of *section 3251, R. S. U. S.*

The case of *State vs. Bengsch,* 170 Mo., 81, was a case remarkably similar to the case at bar, the act there under consideration being entitled "An act to provide for a State license tax on distilled liquors."

The comment of Judge Valliant, of the Missouri Supreme Court, in a separate opinion, *l. c.*, 119, upon the phraseology of the statute, is pertinent. He said:

> "The title is 'An act to provide for a State license tax on distilled liquors, etc.' There is an inconsistent use of words in that sentence. A license is one thing

> and property tax another; the one is a tax on a privilege or occupation, the other a tax on property. We must understand the legislature to have intended the one or the other; that is, either a license tax or a tax on distilled liquors. There is no such thing as a license tax on distilled liquors. To give effect to the word 'license' in the sentence quoted, we must supply other words to indicate a privilege and what privilege is intended to be exercised in regard to distilled liquors which would be to take a great liberty with the act. The only way to render the sentence intelligible is to discard the word 'license' and that we may do because in that connection it is meaningless."

So, in the act before the court, the title provides "for license taxes on compounded, rectified, adulterated, or blended distilled spirits," and the court had no authority to "take a great liberty with the act" and amend the title and body of the act by inserting therein the words "business or occupation of" and changing "compounded" into "compounding," "rectified" into "rectifying," "adulterated" into "adulterating," and "blended" into "blending," thus transforming four adjectives into four participles so as to make the title and body of the act, *mutatis mutandis*, read, "An act relating to revenue and taxation, providing for license taxes on the business or occupation of compounding, rectifying, adulterating, or blending of distilled spirits," which would be necessary to make the title conform to the body of the act as the latter was construed by the Court of Appeals.

In the case of *City of Brookfield vs. Tooey*, 141 Mo., 619, a "license tax" of one per cent per annum, imposed by ordinance on the value of goods, wares, and merchandise intended to be kept on hand during the year for which the license was applied for, was held to be a tax on property and not a license on occupation.

This court, in the case of *Adams Express Company vs. Kentucky*, 166 U. S., 171, considered the sections of the Kentucky constitution relating to taxes, and in that case upheld an assessment upon the franchises of an express com-

pany on the theory that it was intangible property, and that the act of the assembly imposing certain taxes thereon was in harmony with the State constitution. The case came to this court from the United States Circuit Court for the district of Kentucky. This court said:

> "We concur with the views of the circuit court that neither section 172 of the constitution nor any other section confines 'the levy of an *ad valorem* tax to tangible property; but, as decided by the Kentucky Court of Appeals in *Levi vs. Louisville*, 97 Ky., 394, it does require the levy of an *ad valorem* tax upon personal property as well as real estate, and this case decides that a license tax which is not a property tax cannot be substituted for an *ad valorem* tax upon personal property engaged in certain commercial pursuits in the city of Louisville."

In view of this court's reference in the Adams Express Company case, *supra*, to the circuit court's views in the case of *Levi vs. Louisville*, 97 Ky., 394, an examination of the latter case is pertinent to the matter now under consideration. The Kentucky Court of Appeals in the Levi case, in the course of a discussion of the State constitutional provisions in regard to taxes, held that an attempted substitution of a license tax for an *ad valorem* tax on personal property "was bad under the State constitution." After pointing out the legislative declaration as to what occupations were then subject to license tax under the Kentucky constitution, and mentioning the character of business then subjected to license, the court, in *Levi vs. Louisville, supra*, said (*l. c.*, 408):

> "The framers of the Constitution left no discretion with the legislature as to the assessment or valuation of either real or personal property, and as to what property shall be taxed or exempted from taxation, and however wise or unwise the system may be, it is the mandate of the Constitution that all must obey. *It results, therefore, that the imposition of a license tax upon personalty, whether used or not used in a*

business for the exercise of which license fees are paid, or license tax imposed, is not warranted by the Constitution."

THE TAX IS DISCRIMINATORY.

Examining the effect of this "license tax" on compounded, rectified, blended or adulterated distilled spirits, we cannot avoid the conclusion that it imposes upon distilled spirits made and marketed by blenders and rectifiers in the State of Kentucky a distinct property impost of so much per gallon of spirits. This plain property tax, though denominated a "license tax," is a tax to which no other distilled spirits of similar kind and character, made by others within or without the State, are subjected.

To make the point quite patent, it is only necessary to consider that under the provisions of the act in question, a rectifier and blender operating in the city of Cincinnati, Ohio, may send across the river to the city of Covington, Kentucky, one hundred barrels of blended or rectified distilled spirits which enter the market in the city of Covington, Kentucky, without let or hindrance or subjection to any tax except general property tax levied by the State of Kentucky upon all personal property within its borders. Yet a rectifier and blender in the city of Covington, Kentucky, cannot place one hundred barrels of rectified or blended spirits upon the market in that city without having such spirits subjected to a burden of one and one-fourth cents per wine gallon, to their manifest disadvantage in the market, as against the goods marketed by the Cincinnati blender and rectifier.

The only suggestion in the act which in any way attempts to prevent this particular phase of discrimination is that portion of section 7 which provides that compounded, rectified, blended or adulterated distilled spirits shipped into the State of Kentucky for the purpose of being labeled, marked, or stamped as "Kentucky whisky, product or spirits," or which before shipment or thereafter shall have

been so labeled, branded, marked or stamped, shall be subjected to the tax. While it may be that the operation of this provision would be to subject *some portion* of the blended and rectified whisky, brought from elsewhere into the State of Kentucky, to the taxation imposed by the act, thereby placing such spirits so particularly specified on an even footing with Kentucky rectified and blended distilled spirits, this express designation of the particular foreign spirits to be taxed under the act equally with the entire Kentucky product necessarily implies that all other rectified and blended distilled spirits, coming into the State of Kentucky, shall be free from and unhampered by the tax imposed upon the Kentucky product. *Expressio unius est exclusio alterius.*

There is no inherent distinction between blended and unblended distilled spirits sufficient to justify a tax on the blended distilled spirits not likewise imposed on unblended distilled spirits. As will be shown later in this brief, under the discussion of the several classes of distilled spirits mentioned in the act, Appendix A, the tax discriminates against the distilled spirits attempted to be subjected thereto in favor of the exempted spirits produced in the State as well as similar exempted spirits coming from other States and countries.

The Authorities Condemn the Act as Unconstitutional.

As a controlling authority on this aspect of the case, the court's attention is invited to the judgment of this court in the case of *Hinson vs. Lott,* 75 U. S., 148. In that case an act of the State of Alabama was under consideration, a section of which provided as follows:

> "Before it shall be lawful for any dealer or dealers in spirituous liquors to offer any such liquors for sale within the limits of this State, such dealer or dealers introducing any such liquor into the State, shall first

> pay the tax collector of the county into which such liquors are introduced, a tax of fifty cents per gallon upon each and every gallon thereof."

The case arose by virtue of the effort of the holder of five barrels of whisky consigned to him by Dexter, of the State of Ohio, to be sold on account of the latter in the State of Alabama, to evade the tax, on the ground that the act was in conflict with the Constitution of the United States as imposing a burden upon interstate commerce. Mr. Justice Miller, in delivering the opinion of the court, used the following language:

> "The tax in the case before us, if it were of the character we have suggested, discriminating adversely to the products of all other States in favor of those of Alabama, and involving a principle which might lead to actual commercial non-intercourse would, in our opinion, belong to that class of legislation and be forbidden by the clause of the Constitution just mentioned.
>
> "But a careful examination of that statute shows that it is not obnoxious to this objection. A tax is imposed by previous sections of the same act, of fifty cents per gallon on all whiskey and all brandy from fruits manufactured in the State. In order to collect this tax, every distiller is compelled to take out a license and to make regular returns of the amount of distilled spirits manufactured by him. On this he pays fifty cents per gallon. So that when we come, in the light of these earlier sections of the act, to examine the 13th, 14th, and 15th sections, it is found that no greater tax is laid on liquors brought into the State than on those manufactured within it. *And it is clear that whereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment, as to liquors manufactured within the State, the tax on those who sold liquors brought in from other States was only the complementary provision necessary to make the tax equal on all liquors sold in the State.*"

In the case of *State vs. Bengsch*, 170 Mo., 81, *supra*, provisions of the constitution of Missouri quite similar to those of the State of Kentucky under review were held by the Supreme Court of Missouri to condemn the act there; and while the act was held unconstitutional on other grounds, the court considered and approved the rule in *Hinson vs. Lott*, *supra*, as it is contended for here. The act of Missouri, however, imposed *the same tax of ten cents per gallon upon distilled spirits coming into the State of Missouri for sale in competition with the Missouri product subject to the tax, and the court found that the act, while bad in other respects, escaped the condemnation of the Fourteenth Amendment under the operation of this rule to the effect that a State may not impose upon goods from other States a charge not placed upon its own goods, or place upon its own goods a charge not imposed upon goods from other States.*

The exact point here raised under the Fourteenth Amendment was considered and passed upon as controlling the issue in the case of *State vs. Hoyt*, 71 Vt., 59. There the court held unconstitutional as violating the Fourteenth Amendment a statute imposing a license tax of from fifteen to sixty dollars a year on peddlers selling certain goods manufactured in Vermont, *but exempting peddlers selling similar articles made in other States.*

The statute had originally included the peddling of all goods, but was held unconstitutional as including imported goods (State *vs.* Pratt, 59 Vt., 590), under the rule in Brown *vs.* Maryland. The statute was then amended limiting the tax to wares of Vermont, and in such form came before the court in the Hoyt case.

Judge Rowell, *l. c.*, 61, said:

> "Why this was done is not obvious. It may have been because it was thought that it would be unconstitutional to embrace the manufactures of other States, although put upon the same footing as the manufactures of this State. If so, it was a mistake, for it would have been entirely constitutional, as

shown by *Machine Company vs. Gage,* 100 U. S., 676.

"It can hardly be supposed that the intention was to discriminate against the manufactures of this State, and yet that is the effect of the statute, if the license fee is to be regarded as a tax upon the goods authorized to be sold; and that it is to be so regarded cannot be questioned. * * *

"Thus it appears that the statute imposes a tax upon the goods themselves when peddled. This being so, we have said that it discriminates against the manufactures of this State, and that is true. To illustrate: A manufactures watches in Vermont, and B manufactures precisely the same kind and grade of watches in New Hampshire. Each peddles his goods in Vermont. A pays a license fee of sixty dollars for each of his peddlers, while B pays no license fee for his goods. A's goods are discriminated against.

"Now the equality clause of the Fourteenth Amendment provides that no State shall deny to any person within its jurisdiction the equal protection of the laws. The respondent invokes this clause, and says that the statute is obnoxious to it by reason of its discrimination."

The court then considers the question of classification, conceding that the clause was not intended to compel a State to adopt an iron rule of taxation. The court, *l. c.*, 64, says:

"The question, therefore, is one of classification. If, in the case supposed, the resident and non-resident manufacturer or their goods can be differently classed, the statute can be sustained; otherwise not. The rule on this subject is, that the mere fact of classification is not enough to exempt a statute from the operation of the equality clause of said amendment, but that in all cases it must appear, not only that a classification has been made, but that it is one based on some reasonable ground, some difference that bears a just and proper relation to the attempted classification and is not a mere arbitrary selection. Gulf, Colorado and Santa Fe R. Co. *v.* Ellis, 165 U. S., 150.

"Under this rule it seems impossible to make a classification here, for want of a sufficient ground on

which to base it. It cannot be based on any difference in the goods themselves for they are precisely alike; nor on the fact that they were made in different States, for that bears no just and proper relation to a classification but is purely arbitrary. It cannot be based on public policy; for it is not reasonable to say that it is for our interest to encourage the introduction and sale of goods of the non-resident manufacturer, when thereby the manufacture anl sale of goods of the resident manufacturer would be discouraged and perhaps prevented altogether. Nor can it be based on the difference of residence of the manufacturers, for that, as in the case of the goods, would be purely arbitrary also; *and besides would allow a State to discriminate against its own citizens in favor of the citizens of other States, which it cannot do, any more than it can discriminate in favor of its own citizens against the citizens of other States; for the equality clause of said amendment includes everybody. No State shall 'deny to any person within its jurisdiction the equal protection of the laws,' is its language, and its universality of inclusion has never been questioned.*"

This point was considered in the case of *State vs. Montgomery*, 94 Maine, 192, wherein a statute providing for the issuance of peddlers' licenses to "any citizen of the United States" was held invalid under the Fourteenth Amendment as denying to aliens who were to be considered as persons within the jurisdiction of the State the equal protection of the laws. The court said, *l. c.*, 207:

> "The statute is invalid as to aliens. They may peddle without license. *If we hold it nevertheless valid as to citizens, it works a discrimination against citizens and in favor of aliens—a result which we think the legislature plainly did not intend. Cooley on Constitutional Limitations*, 213."

If the rule in *Hinson vs. Lott, supra*, be sound, and it has never been departed from by this court, and if the State cases last cited properly state the law, no argument is needed to sustain the proposition that, if liquors from one State trans-

ported to and offered for sale in another State are not subjected to the same tax imposed upon liquors produced in the State to which the foreign liquors are transported and in which they are offered for sale, there is immediately an inequality in the law.

Let it be supposed that the act of the State of Alabama, considered in *Hinson vs. Lott*, had subjected distilled spirits produced in that State to a tax of fifty cents per gallon upon production *at the distillery*, but had not subjected distilled spirits from other States to the same tax. *It could not then have been decided by the Supreme Court in that case that "the tax was equal on all liquors sold in the State," because the "complementary provision," by which liquors from other States were put on an equal basis with domestic liquors, would have been lacking.*

The situation last mentioned is precisely the situation which exists under the act of the State of Kentucky here in question.

For cases sustaining State measures on the ground that they operated with equality both upon domestic goods and goods from other States, see—

Kehrer vs. Stewart, 197 U. S., 60.
Philips vs. Mobile, 208 U. S., 472.
Pabst Brewing Co. vs. Crenshaw, 198 U. S., 17.
Howe Machine Co. vs. Gage, 100 U. S., 676.

This court, in the case of *Darnell vs. Memphis*, 208 U. S., 113, recently decided that a tax levied upon logs brought into the State of Tennessee from elsewhere was invalid, so long as logs cut from lands within the State of Tennessee were exempt as products of the State. Surely the converse of this rule must be equally true, *i. e.*, a tax levied upon the product of a State is invalid so long as the similar product of other States is exempt within the State.

The Commerce Clause.

It is a well-established rule of constitutional law that a State cannot impose burdens in the way of taxation upon goods from other States or countries not imposed upon those produced within its borders.

By a parity of reasoning, the reciprocal proposition must be true, that a State cannot impose burdens upon domestic goods not imposed upon those coming within its borders from other States and countries.

It may be said in this connection that intoxicating liquors, where authorized as legitimate articles of commerce by the public policy of a State, are upon exactly the same plane as any other legitimate articles of commerce, in their relation to the commerce clause of the Constitution.

License cases, 5 How., 577.
Bowman vs. Chicago & N. W. Ry. Co., 125 U. S., 465.
Leisy vs. Hardin, 135 U. S., 100.

It was said in *Reid vs. Colorado*, 187 U. S., 137, 150, that—

> "Certain principles are well settled by former decisions of this court. One is that the purpose of a statute, in whatever language it may be framed, must be determined by its natural and reasonable effect. Henderson *v.* New York, 97 U. S., 259, 268. Another is, that a State may not, by its police regulations, whatever their object, unnecessarily burden foreign or interstate commerce. Hannibal & St. J. Ry. Co. *v.* Husen, 95 U. S., 465, 472. Again, the acknowledged police powers of a State cannot legitimately be exerted so as to defeat or impair a right secured by the National Constitution, any more than to defeat or impair a statute passed by Congress in pursuance of the powers granted to it."

If the provisions of the Wilson act are to be regarded, then foreign liquors upon their arrival in a State must be sub-

jected to the law of the State to the same extent and in the same manner as though such liquors had been produced within the State.

The act of the General Assembly of Kentucky under consideration in the case at bar, to be valid, must require the placing of the same burden upon spirits brought into the State as upon those produced within its borders.

The following cases support this conclusion:

Scott vs. Donald, 165 U. S., 58, 94.
Guy vs. Mayor of Baltimore, 100 U. S., 434.
Welton vs. Missouri, 91 U. S., 275.

It was held in *Voight vs. Wright,* 141 U. S., 62, that a State cannot, under the guise of enacting inspection laws, make discriminations against the products and industries of other States in favor of its own products and industries.

In this case a statute of Virginia was construed, which compelled the inspection of flour brought into that State and offered for sale therein, and the payment of a fee for such inspection, flour made and sold in that State not being required to be inspected.

This court held the statute void because by its necessary operation it denied equality in the markets of the State when applied to the people and products or industries of other States, and was therefore a burden upon commerce among the States.

The converse of this proposition must be true, that the products of the State of Kentucky, to-wit, the liquors designated in the act under consideration, cannot be subjected to a tax or burden not imposed upon a like product coming into the State from other States or countries; a tax or burden which in the absence of such equality of State imposition becomes a specific burden that the goods of the State, as such, must carry on their journey into interstate commerce.

It may be conceded that a State may validly, in the exercise of its police power, regulate the manufacture of goods that eventually will go into interstate commerce, and that

conversely Congress, in its regulation of interstate commerce, cannot control the manufacture of, as distinct from the commerce in, goods that may eventually go into interstate commerce. An examination, however, of the three leading cases on this topic leads to the conclusion that when a State singles out from the mass of property within its borders a particular article on which it places a tax burden as a distinct impost, so that when that article goes into commerce among the States it inevitably bears such impost as distinct from the general property tax requirements of the State, such impost must be considered as a regulation of commerce.

In the case of *Kidd vs. Pearson,* 128 U. S., 1, this court considered the question whether or not a statute of the State of Iowa prohibiting the manufacture or sale of distilled spirits, except for certain exempted purposes, constituted a regulation of commerce, where the manufacturer purposed the manufacture of liquors for sale in interstate commerce. It was argued by the opponents of the law that since the law permitted the manufacture of liquor for certain purposes the State had no power to prohibit its manufacture for foreign sales. This court said:

> "To support the affirmative, the plaintiff in error maintains that alcohol is, in itself, a useful commodity, not necessarily noxious, and is a subject of property; that the other statute under consideration, by various provisions, and especially by those which permit, in express terms, the manufacture of intoxicating liquors for mechanical, medicinal, culinary or sacramental purposes, recognizes those qualities, and expressly authorizes the manufacture; that the manufacture being thus legalized, alcohol not being *per se* a nuisance, but recognized as property and the subject of lawful commerce, the State had no power to prohibit the manufacture of it for foreign sales.
>
> "The main vice in this argument consists in the unqualified assumption that the statute legalizes the manufacture. *The proposition that, supposing the*

goods were once lawfully called into existence, it would then be beyond the power of the State either to forbid or impede their exportation, may be conceded."

In the Kentucky law at bar no attempt is made to prohibit the manufacture of liquors, and as to at least one of the classes of liquors involved, *i. e.*, blended liquors, no act of manufacture is committed. The mere mixing for sale of two whiskies, for instance, cannot be regarded as an act of manufacture (*Hartranft vs. Wiegmann*, 121 U. S., 609).

The legality of the original manufacture of the goods here involved is unquestioned; the only purpose of this law is to collect a specific tax impost, and burden the goods with the charge thereof. It appears that since these goods are lawfully in existence, it is, in the language of Mr. Justice Lamar last quoted, *"beyond the power of the State either to forbid or impede their exportation."* And it cannot be denied that the subjection of an article in the State of Kentucky to a particular tax burden separate and distinct from the property taxes generally levied in the State as upon all goods within the mass of property in the State does impede and hamper interstate commerce in that article. For the State of Kentucky to say that a gallon of distilled spirits before exportation from the State shall pay a tribute to the State is as certain a burdening of interstate commerce in that gallon of distilled spirits as if the State of Ohio enacted that the same gallon of distilled spirits should pay a special tribute to the State of Ohio upon arrival in the latter State.

The vicious tendency of such taxes is that one State may take tribute from a particular article of its production to the manifest injury of interstate commerce in that article. No attempt is made to argue that the most important function of sovereignty, the taxing function, can lightly be restricted, or that in the exercise of such function a State may not impose even very onerous burdens upon property, or that in the imposition of such burdens a State may not exercise a

telling indirect influence upon that portion of movable property subjected to tax which finally may go into interstate commerce. It is argued, however, that there is an obligation upon the States in the exercise of the function to treat the mass of property within their borders in such an even-handed way that it cannot be said that a particular kind or part of movable property has been singled out for individual impost so that when that particular kind or part of property leaves the State it bears with it not only the indirect burden uniformly laid upon movable property, but in addition thereto carries a specific and extra tax specially laid upon such goods.

To phrase the point differently, it is conceded the States may take from all property within their borders a pro rata contribution of tax; having taken such pro rata contribution of tax from all goods within their borders, the States may not go further and say that a given article shall pay a special tribute, without thereby expressly burdening that article with the extra tribute upon its journey in interstate commerce. Such extra tribute constitutes a regulation and fettering of interstate commerce in that article at the very inception of its journey.

An example of the vicious tendency of such exercise of the taxing power by the States may be found in the following case. The State of Pennsylvania has within its borders the anthracite coal resources of the nation. That coal may be taxed by the State in its unmined condition as real property, or, if mined and in storage, it may be taxed with the mass of personal property in the State. If, however, the State of Pennsylvania required an additional payment of one dollar per ton upon anthracite coal shipped from the mines, we would find immediately a singling out of that particular product which would impose a most grievous burdening of the interstate commerce in an article which thereby the State of Pennsylvania would absolutely control as against every other State in the Union which is obliged to

rely upon the State of Pennsylvania for its supply of the article. No exception could be taken to Pennsylvania's taxing of one of its great natural resources as an important and very valuable part of the mass of property within its borders; but exception should very promptly be taken under the Federal Constitution to an attempted levying of excessive tribute upon that property, and one clause which would make such tribute unlawful is that clause which, by giving to Congress the control of commerce among the States, precludes a particular State from regulating commerce by its taxing or by its policing power, either as the shipping or as the receiving State.

Many States, among them Kentucky (Constitution of Kentucky, section 171), have constitutional provisions requiring uniformity of taxation on all property subject to taxation; and ordinarily such State constitutional requirement would prevent a situation such as is suggested arising. But when such State provision is either lacking, or, with all deference to the court below, is as in the present case unenforced as a State rule, the Constitution of the United States affords protection by the commerce clause.

This court in the case of *United States vs. E. C. Knight Company,* 156 U. S., 1, held that the regulation of the manufacture of an article was not regulation of the commerce in that article, and that even as the States could not interfere with the interstate commerce in goods, so the Congress could not interfere with the manufacture in a State of an article. In that case the question was whether or not the ownership and operation of a number of sugar refineries, tending to a monopoly of the manufacture of refined sugar, was so related to the interstate commerce in refined sugar as to bring the case within the act of Congress of July 2, 1890. The court said (*loc. cit.,* 17):

> "There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or com-

merce might be indirectly affected was not enough to entitle complainants to a decree."

The court in the Knight case relied upon and quoted at length from Kidd *vs.* Pearson, *supra,* but it is submitted that the latter case is an authority in support of the contention here being urged, and that since it is shown that the tax sought to be imposed here is a direct and inevitable burden upon the goods in interstate commerce, it is certainly and clearly distinguished from the rule in the Knight case. The effect of a monopoly of the manufacture of an article by private individuals upon interstate commerce must be conjectural; the placing of a specific charge upon each gallon of distilled spirits leaving a State is absolute, fixed, determinable, and present.

In the case of *Addyston Pipe and Steel Company vs. United States,* 175 U. S., 211, the court distinguished the facts from those appearing in the Knight case and held that the selling combination of manufacturers of pipes was an invalid regulation of interstate commerce, as unlawful as if a similar regulation had been attempted by a State. The court said (*loc. cit.,* 240):

> "The direct and immediate result of the combination was therefore necessarily a restraint upon interstate commerce in respect of articles *manufactured by any of the parties to it to be transported beyond the State in which they were made.* The defendants by reason of this combination and agreement could only send their goods out of the State in which they were manufactured for sale and delivery in another State, upon the terms and pursuant to the provisions of such combination. As pertinently asked by the court below, Was not this a direct restraint upon interstate commerce in those goods?"

The foregoing language may be paraphrased to fit the facts of the case at bar. When this is done we have the two following parallel statements:

Case at Bar.

The direct and immediate result of the tax is, therefore, necessarily a restraint upon interstate commerce in respect of the articles manufactured by any of the parties coming within the tax for transportation beyond the State of Kentucky. The State of Kentucky by reason of this tax permits only such goods to go out of the State of Kentucky for sale and delivery in another State, as have complied with the terms and pursuant to the provisions of such tax. It may be pertinently asked of the court, Is not this a direct restraint upon interstate commerce in those goods?

Addyston Pipe Case.

'The direct and immediate result of the combination was, therefore, necessarily a restraint upon interstate commerce in respect of articles manufactured by any of the parties to it to be transported beyond the State in which they were made. The defendants, by reason of this combination and agreement, could only send their goods out of the State in which they were manufactured for sale and delivery in another State upon the terms and pursuant to the provisions of such combination. As pertinently asked by the court below, Was not this a direct restraint upon interstate commerce in those goods?

Mr. Justice Peckham, speaking for the court in the Addyston Pipe case, made a pertinent observation at page 245 as to the effect of increasing the cost of an article upon trade in the article. He showed that if iron pipe cost one hundred dollars a ton, no one would contend that the trade in it would amount to as much as if the lower prices prevailed. There can be no distinction in effect between an increasing of the price of an article in interstate commerce by virtue of a combination of private individuals, and the increase secured by discriminatory tax by a State. In each case the increase is inevitable, and it is all the more hopelessly inevitable when the State, by taxing laws which it stands ready to enforce, both civilly and criminally, adds the tax which causes the increase of price.

Immediately following the observation of Mr. Justice Peckham last referred to, the opinion in the Addyston Pipe case considers—

> "Decisions regarding the validity of taxation by or under State authority, involving sometimes the question of the point of time that an article intended for transportation beyond the State ceases to be governed exclusively by the domestic law and begins to be governed and protected by the national law of commercial regulation."

The court said (*loc. cit.*, 246) that these cases were not of very close application in the Addyston Pipe case, and added:

> "The commodity may not have commenced its journey, and so may still be completely within the jurisdiction of the State for purposes of State taxation, and yet at that same time the commodity may have been sold for delivery in another State. Any combination among dealers in that kind of commodity, which, in its direct and immediate effect forecloses all competition and enhances the purchase price for which such commodity would otherwise be delivered at its destination in another State, would, in our opinion, be one in restraint of trade or commerce among the States, even though the article to be transported and delivered in another State were still taxable at its place of manufacture."

It is submitted that the doctrine last announced is not only sound, but in line with the foregoing argument to the effect that goods intended for interstate commerce may still be subjected to the general tax imposed upon all property within a State. Appellants here have no objection to urge against the ad valorem tax which is imposed upon their goods here involved as part of the mass of personal property in the State of Kentucky. Such tax may be imposed even though goods of the class here in issue may be separated and set apart for shipment out of the State. For the general property tax of a State is like the dust of its fields or the effect

climate
of its [redacted] upon the goods—*i. e.*, a natural and inherent thing not to be evaded or sought to be evaded.

What is objected to, and what it is urged is unconstitutional as a specific burdening and fettering of commerce is the singling out of these particular goods by the State of Kentucky for a levy of tribute, *in addition to the general ad valorem property tax*, which levy of tribute must add to the goods a charge which increases their price in interstate commerce and the imposition of which is the placing of a burden upon them by the State of Kentucky in their interstate journey.

It is submitted that interstate commerce in a given article may as well be fettered by the State of origin of the goods as by the State of destination of the goods, and that in each case the fettering is equally vicious and unconstitutional.

Imposts upon Exports.

The prohibition upon the States against placing imposts upon exports and imports is, as to imports, confined to a restriction of the State power as regards imports from foreign countries (*Woodruff vs. Parham*, 8 Wall., 123).

It has, however, never been decided that the prohibition as to exports would apply only to exports from a State to a foreign country.

If the prohibition contained in the clause of the Federal Constitution in regard to imposts upon exports should be held to include goods sent from the State to other States, the same state of facts, which would render this prohibition operative, would likewise create a conflict with the commerce clause of the Constitution; therefore, it may be a work of supererogation to urge that the act in the present case conflicts with this prohibition upon the States.

The attention of the court may be called, however, to the case of *Crandall vs. Nevada*, 6 Wall., 35, which was later approved in *Cook vs. Pennsylvania*, 7 Otto, 566. In the

former case, the facts disclose an attempt on the part of the State of Nevada to make a charge upon passengers leaving the State by stage coach. The Nevada act was held unconstitutional under the commerce clause, and as violating the prohibition against State imposts, and on the ground that it imposed a charge upon the passing of stage-coach passengers through the State, and thereby abridged the privileges and immunities of citizens of the United States. If the act of the State of Nevada was bad under the clause here suggested as placing a charge upon passengers leaving the State of Nevada, it is contended that the act of the State of Kentucky now under consideration is bad as imposing a specific charge on each gallon of distilled spirits that may go out of the State of Kentucky.

Respectfully submitted,

W. M. HOUGH.
LEVI COOKE.

APPENDIX A.

As to the Character of Spirits which the Act Attempts to Classify and Tax.

The Court of Appeals in its opinion (Record, pp. 14-15) commented upon the business of rectifying, using the following language:

> "It is a matter of common knowledge that a large part of the whisky used in the United States is rectified; that is, that a barrel of whisky as it comes out of the distillery is adulterated by the rectifier so as to make five or six barrels of whisky out of it, (see Taylor *vs.* Taylor, 27 R., 628), and it is this business of multiplying the whisky which is distilled that the legislature imposes the license tax upon."*

Even if the question of manufacturing and the commercial practice involved in the business of rectifying and blending distilled spirits were material for any purpose in this case, this court is sufficiently advised by general knowledge

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* The court below was, with all deference, in our opinion entirely misled on the purpose and effect of the law. While the act relates only to distilled spirits, designated as compounded, rectified, adulterated or blended, the court confines its justification of the act to the state of the whisky trade as set forth in the part of the opinion quoted.

It is respectfully suggested that the court did great violence in using the language stated, not only to matters of trade fact, but of physical science. Three barrels of whisky from one distillery and three barrels of whisky from another distillery may be mixed so as to make six barrels of blended whisky of uniform character. But it is a physical impossibility to make six barrels of whisky out of one barrel of whisky. Three plus three may make six, but three alone cannot make six.

It is respectfully suggested that the learned court below, in attempting to find a necessity of public policy on which a justification of the act as a sort of police measure could be based, departed widely from the well-known facts of the matter, and fell into a very grave misapprehension. See discussion of the fourth question, brief on motion for rehearing below, Record, p. 29, *et seq.*

brought to its attention in similar cases, and by the general provisions of the United States internal revenue laws, to be enabled to pass, without extended argument or the presentation of facts in the record, upon the foregoing suggestion by the court below.

Undoubtedly a State legislature, in the interest of the public, has authority to make such restrictions as it deems advisable upon the practice of adulterating any article of popular use. But such legislation by a State must operate uniformly, not only to protect the people, but even to prevent discrimination between persons profiting by the practice.

If this act were aimed only at adulterated distilled spirits, and the description of the subject taxed read: "adulterated distilled spirits" instead of "compounded, rectified, blended or adulterated distilled spirits," this act would still be subject to the defects before stated, for the reason that a producer of adulterated distilled spirits in the State of Ohio could send his product into the State of Kentucky for sale there in competition with Kentucky adulterated spirits without subjecting the Ohio product to the so-called police supervision to which the Kentucky product is subjected.

There would be then no police protection to the people of Kentucky against adulterated distilled spirits as such, but only against that portion of adulterated distilled spirits offered for sale in Kentucky that was the product of the State. And it is unnecessary to suggest that adulterated distilled spirits made in Cincinnati, Ohio, are as a general proposition equally injurious with adulterated distilled spirits made in Covington, Kentucky.

But this court is aware that the great volume of the compounded, rectified and blended distilled spirits are not adulterated distilled spirits, and that for the purpose of a just examination of the operation and effect of this act, it is necessary to consider with some degree of distinction the several classes of distilled spirits coming within the definition of the distilled spirits affected by this act.

Passing adulterated distilled spirits with the comment just made, and admitting that adulterated distilled spirits may include articles only to be tolerated or even suppressed by any measures which the State legislature may see fit to adopt in the interest of public health, the other classes of distilled spirits mentioned in the act are: *first,* compounded; *second,* rectified; and *third,* blended and distilled spirits.

Compounded distilled spirits have generally been considered in the trade and by the internal revenue laws to be those alcoholic beverages in which high flavors are used to secure particular types of liquors, as, for instance, cordials, gins, and the liqueurs. There has been a tendency in the trade to consider as compounded distilled spirits those liquors which as marketed consist of distilled spirits from different sources, as, for instance, a compound of spirits distilled from fermented grain and spirits distilled from fermented molasses.

Rectified distilled spirits means distilled spirits which, after a crude distillation, have been subjected to processes of refinement and rectification either by way of leaching the distilled spirits in their crude form through charcoal for purposes of purification or by redistillation and consequent fractionation resulting mechanically in a purer spirit. Rectified spirits have also been deemed to include, particularly by the United States revenue service, all distilled spirits in the preparation of which in final form for the market the rectifier, by virtue of section 3244, R. S. U. S., and the regulations and decisions of the Bureau of Internal Revenue thereunder, is subject to rectifier's special tax to the United States Government.

Blended distilled spirits constitute a distinct kind of distilled spirits, by no means so inclusive as either compounded or rectified distilled spirits according to the various uses of those phrases. Blended distilled spirits are universally understood by the trade to mean the mixtures of distilled spirits of the same type for purposes of the market, two or more distilled spirits from the same fermented material being blended in order to secure a standard of flavor and character which it would be impossible to secure by operation of the still in the production of any one of the particular distilled spirits entering into the blend.

It will be readily seen that in the production of compounded, rectified, and blended distilled spirits according to the established practice of the trade in such spirits liquors are produced which are as typical and have secured as permanent and now necessary a function in the market as any distilled spirit not subjected to the art of compounding or rectification or blending.

The court is aware that by far the greater portion of the trade in the most popular of all distilled spirits among Eng-

lish-speaking people, to wit, whisky, is in whisky that has been blended. This is not only the case in the United States, where the popular demand is for mild whisky that can be secured only by blending the more heavily flavored grain spirits with the more lightly flavored grain spirits, but it is known by every one that the great world market for Scotch and Irish whiskies has been secured and retained by virtue of the sale in the markets of all countries where whisky is drunk of a spirit which is the result of blending the heavily flavored Scotch and Irish whiskies with the mildly flavored Scotch and Irish whiskies. That resultant blended whisky is, by the judicious apportionment of the several differently flavored whiskies, made of the standard flavor suitable for the particular trade for which it is intended.

The court is further aware that the light-flavored whiskies have that characteristic on account of the reduction in them of the content of higher alcohols commonly known as fusel oil and other by-products of fermentation the effect of which in whiskies has always been deemed to be deleterious and injurious to the drinker. The general adoption of such whisky by drinkers constitutes a selection of the fittest in whiskies by the people, and even if there were ground for dispute as to the deleterious or injurious effect of the higher content of those substances in whisky, the verdict of the people would establish that by their experience the whiskies containing the higher amounts of those substances are objectionable as a matter of taste if nothing else. *De gustibus non est disputandum.*

In this connection it is urged upon the court that a dealer in whiskies in Kentucky has every right to market his whisky either in the form in which he receives it from the distiller or by mixing separate consignments received from the same or different distillers without thereby being justly subjected to a tax upon his whisky so mixed to which all other whisky in the State of Kentucky, even though unmixed, is not likewise subjected. There is no inherent difference between whisky in two barrels in the form in which it comes from the distiller and the same whisky poured into a vat, mixed and returned to the barrels, which should subject the whisky in its blended state to a tax imposition not laid upon other whisky. All whisky should be taxed alike, and any attempt to create a tax imposition upon blended whisky in the State of Kentucky to which unblended whisky is not

subjected can only be deemed a measure enacted for the purpose of creating a discrimination in favor of the product of the distiller, both in and out of the State of Kentucky, as well as in favor of compounded, rectified, adulterated or blended spirits coming into Kentucky.

APPENDIX B.

The Text of the Act in Issue.

"An act relating to revenue and taxation, providing for license taxes on compounded, rectified, adulterated or blended distilled spirits, known and designated as single-stamp spirits, and providing penalties for violations of its provisions.

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

"SECTION 1. Every corporation, association, company, copartnership or individual engaged in this State in the business or occupation of compounding, rectifying, adulterating or blending distilled spirits, known and designated as single-stamp spirits, shall pay to the Commonwealth of Kentucky a license tax of one and one-fourth cent upon every wine gallon of such compounded, rectified, blended or adulterated distilled spirits.

"SEC. 2. It shall be the duty of each corporation, association, company, copartnership or individual engaged in this State in the business or occupation of compounding, rectifying, adulterating or blending distilled spirits, known and designated as single-stamp spirits, to make and deliver to the auditor of public accounts, on the thirtieth day of June, one thousand nine hundred and six (or within ten days thereafter), and at the end of each six months thereafter, a report sworn to, upon blanks to be furnished by the auditor, stating the name, place of business and the number of wine gallons of compounded, rectified, adulterated or blended distilled spirits, known and designated as single-stamp spirits, made during the six months then ended, and such other information as the auditor may require, and at the same time pay into the State treasury, through the au-

ditor, the amount of taxes due the State, as herein provided, imposed by the last preceding section.

"SEC. 3. Before any corporation, association, company, copartnership or individual shall engage in the business or occupation of compounding, rectifying, adulterating or blending, in this State, the auditor of public accounts shall be given notice of the intention of such corporation, association, company, copartnership or individual to engage in such business or occupation. The notice shall contain the name and place of residence of such corporation, association, company, copartnership or individual, and the approximate number of wine gallons of such compounded, rectified, adulterated or blended spirits the applicant contemplated making prior to the first date at which he is required to report the number of gallons made to the auditor of public accounts under this act.

"SEC. 4. Upon receipt of such notice by the auditor of public acounts, he shall issue to each applicant a certificate, showing that he has complied with this act. Any corporation, association, company, copartnership or individual, who shall engage in the business of compounding, rectifying, adulterating or blending distilled spirits, known and designated as single-stamp spirits, without first receiving said certificate herein provided for from the auditor of public accounts, shall be guilty of a misdemeanor and subject to indictment in the Franklin circuit court, and fined any sum not less than five hundred dollars nor more than two thousand dollars.

"SEC. 5. Upon the payment of the license tax to the treasurer through the auditor of public accounts, as provided in this act, the auditor of public accounts shall issue to such corporation, association, company, copartnership or individual authority to continue in the business or occupation of compounding, rectifying, adulterating or blending distilled spirits known and designated as single-stamp spirits, if such authority is desired for six months or until the date provided in this act when reports are to be made.

"SEC. 6. Any compounder, rectifier, adulterator or blender liable for taxes imposed by this act, or embraced by its provisions, who shall fail or refuse to make and deliver to the auditor of public accounts a sworn report, containing all the facts required to be reported, and pay the license tax as required by this act, shall be deemed guilty of a mis-

demeanor, and, upon conviction, shall be fined not less than fifty nor more than one hundred dollars for each day of such failure or refusal, to be recovered by indictment in the Franklin circuit court, and shall forfeit his right to engage in said business in this State.

"SEC. 7. Any corporation, association, company, copartnership, or individual who shall ship any compounded, rectified, blended or adulterated distilled spirits, known and designated as single-stamp spirits, into this State for the purpose of labeling, branding, marking or stamping the same as Kentucky whisky, product or spirits, or which, before shipment into this State, shall have been, or may thereafter be, labeled, branded, marked or stamped as Kentucky whisky, product or spirits, shall be deemed compounders, rectifiers, blenders or adulterators under the provisions of this act, and shall pay the license tax imposed herein on compounders, rectifiers, blenders or adulterators of such spirits in this State, and shall make the report required herein to the auditor of public accounts.

"Any corporation, association, company, copartnership or individual who shall violate this section of this act shall be deemed guilty of a misdemeanor, and fined in any sum not less than five hundred nor more than one thousand dollars. Each shipment shall be deemed a separate offense. The Franklin circuit court shall have jurisdiction of all offenses committed under this act.

"SEC. 8. All laws or parts of laws in conflict with this act are hereby repealed."

See Acts 1906, p. 449.

Supreme Court of the United States.

BROWN-FORMAN COMPANY - - - - - - *Plaintiff in Error,*

VS.

COMMONWEALTH OF KENTUCKY - - - - - *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The Commonwealth of Kentucky has been striving for a long time to impose and collect a tax upon the business or occupation when carried on in the State of rectifying, blending or adulterating distilled spirits—making what is popularly known as "Single Stamp" spirits. An Act of March 24, 1904 (Acts 1904, page 255) provided a license tax of 50 cents per barrel and 25 cents for each package less than a barrel.

The tax was, of course, resisted, and in Thierman Co., vs. Commonwealth 97 S. W. Rep. 366, the Act was condemned because it originated in the Senate and thus violated Sec. 47 Ky. Constitution.

That Act was substantially the same as that under consideration in this case—the titles being identical, but it did not contain Sec. 7 of the present law in form nor substance. During the regular session of 1906, the General Assembly attempted to pass an Act imposing a tax on the business, but it failed. And immediately upon the Session's termination by the Constitutional limitation an extraordinary session, was convened by the

Governor, and the Act in question was passed. It is found in Transcript of Record p. 9-11. It took effect June 25, 1906. June 30, 1906, Plaintiff in error filed a report with the Auditor showing that after the Act took effect it had compounded or rectified of distilled spirits, known as "Single Stamp" spirits 2,795.64 wine gallons and paid theron 1½ cents per gallon, to wit; $34.94, and claiming that by the Act it was only intended to impose a tax upon the product of blending or adulterating **"Single Stamp"** spirits—it declined to pay more, though—"for the **information** of the Auditor" it reported that it had rectified, blended, etc., 17,100 gallons of **"double stamp"** spirits. It may be briefly stated that by the common usage these terms are thus understood: When spirits are distilled and placed in bonded warehouses, a stamp is, by the U. S. revenue officer in charge, placed on the barrel; when the revenue tax is paid and the barrel is taken "out of bond" another government stamp is placed on it, and so "straight" unblended spirits or whisky—in the original package—is called "Double Stamp" (see opinion Court of Appeals, Tr. Rec. p. 11).

The tax on this double stamp product of plaintiff in error amounted to $210.25, which it declined to pay, and on September 18, 1906 the Commonwealth commenced this action to recover said sum. This was the only action brought for similar taxes. For a time the collection was suspended by the Auditor, but when the judgment of the Franklin Circuit Court (The Fiscal Court of the State) was affirmed by the Court of Appeals of Ky., those engaged in the business sought to be taxed, made their reports and paid their taxes. But it will be observed that, while the sum involved here is small, should the entire Act be held invalid the result would be serious.

It is known to all that in Kentucky the business of making whisky—i. e., "straight" whisky is enormous, and perhaps as well known, and it is true, that the business of rectifying, blending or adulterating liquors is still greater. Many large distilleries are run for the sole purpose of making whisky to be used in blending. In its opinion (copied into the Record herein p. 15) the Court of Appeals—quoting from a former opinion cited—says:

> "It is a matter of common knowledge that a "large part of the whisky used in the **United States** "is rectified; that is, that a barrel of whisky as it "comes out of the distillery is adulterated by the "rectifiers so as to make five or six barrels of whisky "out of it—and it is this business of multiplying the "whisky which is distilled that the legislature im- "posed the license tax upon."

So if this attempt to derive revenue to the State from this immense and apparently very profitable business be held ineffectual—then all the taxes collected during nearly 4 years will be demanded back by the rectifiers and the Commonwealth's Treasury overwhelmed with claims.

After demurrer to the Petition, and Answer filed by plaintiffs in error and demurrer to the answer had been considered the Circuit Court sustained the demurrer to the Answer, and rendered judgment for the amount claimed September 29, 1906. On appeal the Court of Appeals affirmed the judgment of the Circuit Court, April 19, 1907, and the petition for rehearing being overruled June 28, 1907, the case is here for review, so far as the "Federal" questions if any are involved.

Paragraph 1 of the answer set up the defense above outlined—that it was only required to pay the license tax on the product of blending or rectifying "Single

Stamp" spirits. Paragraphs 2-(a) (b) (c) (d) (e) (f) and 3 (a) (b) (c) only claimed that the Act was invalid for the various reasons suggested. This answer presented no defense tested by the provisions of the Civil Code of Practice of Ky., to-wit:

> "Neither the evidence relied on by a party, nor "**presumptions of law**, nor facts of which judicial "notice is taken, excepting private statutes, shall be "stated in a pleading."

The answer contains not a single allegation of a **material fact** such as the rules of pleading require. By the demurrer to the petition however, there were put in issue all the questions of law suggested therein by the answer, and upon all these the Court of Appeals passed, and in doing so construed the title and the different sections assailed and the Act as a whole. All the objections save those to Section 7 were based upon the grounds that the title and generally the provisions of the Act violated various sections and provisions of the State Constitution.

Counsel for the defendant in error has seen no brief for plaintiff in this Court and can only determine what may be contended for by referring to the Petition for rehearing in the Court below, and the assignment of errors which last does not indicate what parts of the Act is to be complained of as violating any right arising under the U. S. Constitution. But it seems that such claim will be based upon the 7th Section. (Tr. pp. 10-11.)

I.

THIS COURT IS BOUND BY THE INTERPRETATION GIVEN THE ACT BY THE HIGHEST STATE COURT.

This is well established. In Tullis v. Lake Erie, etc., R. 175 U. S. 348 (44: 192) it was held:

> "The interpretation of a State Statute, affixed to "it by the State Court of last resort will not be dis- "regarded by the U. S. Supreme Court, and a dif- "ferent construction given to the Statute which will "make it repugnant to the Federal Constitution." "The Court said:
>
> "But the elementary rule is that this Court ac- "cepts the interpetation of a Statute of a State af- "fixed to it by the Court of last resort thereof."

See also:

Mo., Kansas & Texas R. v. McCann, 174 U. S. 580 (43: 1093).

In Waters Pierce Oil Co. v. Texas, 177 U. S. 28; (44: 657), it is said:

> "What they (the State Courts of last resort) " 'say the statutes of that State mean **we must ac- "cept them to mean** whether it is declared by limit- "ing the objects of their general language, or by **"separating** their **provisions into valid and invalid "parts.**" '

So in this case as the State Supreme Court has held that the Seventh Section only applied to persons shipping liquors into Kentucky for the fraudulent purpose of having them **falsely branded**. And that Court is bound by that decision. No person, who in good faith ships into the State spirits, **entitled to be** branded as Kentucky product, would be subjected to any penalty, being protected by

the decision of the highest State Court, in this case, as to the meaning and application of that section upon the point raised.

But it is submitted that plaintiff in error can no more raise this question than that of the "Interstate Commerce" clause next considered.

In interpreting the Act the Court of Appeals said (Tr. p. 14):

> "The Act is not aimed at the spirits used in "rectifying. It levies a license tax upon **the busi-** "**ness**. The thing in the mind of the Legislature "was the **business** of **rectifying**, and the license tax "is regulated by the amount of the **product**."

It thus appears that the gist of the Act is the taxing, by way of a **license**, the **business** of **rectifying** spirits in Kentucky, and the 7th Section properly provided that if individuals, corporations, etc., do certain things in **Kentucky**, they should be held to be engaged in the "business" in Kentucky, and the tax imposed accordingly. It is surely within the province of the General Assembly to determine and define what shall constitute a given "business" within the State, and no valid objection can be successfully urged if all who so engage are treated alike by the law.

And, in interpreting the 7th Section, the Court said (Tr. p. 15):

> "Section 7 of the Act is a **legislative exercise** "of the **police power** to protect the people of the "State against deleterious compounds, to prevent "shifts and devices to evade the tax, **and to protect** "**the manufacturers of the State** against competi- "tion with rivals who **falsely** mark their goods, "'Kentucky whisky' to deceive purchasers."'

Here the Kentucky Court of last resort, interpreting Section 7, say it is not the true meaning that a foreigner may ship into this State rectified whisky and pay no tax on it, thus discriminating against the manufacturer in Kentucky, but that if he with fraudulent purpose, seeks, by shipping to the State whisky, and **falsely** branding it "Kentucky Whisky" he is to pay the tax.

It is suggested in Petition for Rehearing that even though whisky be shipped into this which, being made here is entitled to be branded "Kentucky Whisky" it is to pay the tax and the foreign rectifier is thus discriminated against, and such tax is a regulation of **Interstate Commerce**, and violates Section 8, Act 1, U. S. Court.

II.

PLAINTIFF CANNOT RAISE THE QUESTION OF INTERSTATE COMMERCE.

For two reasons this question cannot be made. (1). This Court will not presume a person will commit an act of utter folly. It would be folly for a person to ship into this State whisky made in Kentucky for **the purpose** of having it branded or branding it "Kentucky Whisky" or product. It would be entitled to be so branded before shipment, and the Court, interpreting the 7th Section as above quoted says it applies and is intended only to apply to those who seek to **fraudulently** secure the **false** mark or brand, surely this is within the police power as a regulation.

But (2). Plaintiff in error does not belong to the class thus alleged to be discriminated against and cannot be heard to complain even though the Act might be so construed. The answer admits plaintiff is a resi-

dent rectifier and sought to be taxed only as such, it is not proposed to tax liquors shipped into Kentucky, but upon the rectified spirits which the answer admits was made the company in the State, therefore it has no interest in the question raised as a matter of Interstate Commerce. In Castillo v. McConnico, 168 U. S. 674 (42: 622) it is said:

> "The plaintiff in error has no interest to assert "that the Statute is unconstitutional. Because a "Statute **might** be construed to violate the Consti- "tution is not sufficient to raise a Federal question "but the right of the **plaintiff in error** is limited "solely to the inquiry whether, **in the case presented**, "the Statute is so applied as to deprive him of his "property without due process of law."

In The People v. Rensaler & Saratoga R. R. Co. 15 Wend. (N. Y.) 113; 30 Am. Dec. 33 held:

"The constitutionality of a legislative act cannot be called into question by the 'People.' Individuals **alleging themselves to be injured thereby,** alone can raise the question."

Clark v. Kansas City, 176 U. S. 114 (44: 392).

Cooley Const. Lim. 6th Ed. 196.

County Supervisor v. Stanley, 105 U. S. 305 (26: 1044).

Stickrod v. Commonwealth, 86 Ky. 285 (5 S. W. 580).

Jones v. Black, 48 Ala. 540 (7 N. D. 169; 148 Ind. 467; 168 Ind., 631).

III.

NO IMPOST ON IMPORTS.

The 7th Section does not violate the 2d clause of Section 10, Act 1, U. S. Constitution, which reads:

> "No State shall, without the consent of the "Congress, lay any imposts or duties on imports "or exports **except** what may be absolutely neces- "sary for executing its inspection laws' * * * "

(1) It will be noticed that the clause **excepts** what may be necessary to execute the **inspection** laws. The answer of the plaintiff in error simply charges that that clause is violated without showing how or why—by laying imposts on imports, but it fails to state that such alleged "impost" is not necessary to executing the inspection laws of the Commonwealth. And under the rules of pleading the Court will not presume, in the absence of the averment, that there are no inspection laws, nor that the impost, if it be one, is not necessary to their execution, more especially if such presumption would lead to declaring the law unconstitutional.

(2) But that clause applies—not to imports between the States, but to foreign imports. This is clearly indicated by the remainder of the clauses, and it is so held by this Court—Construing this clause. In Am. Steel & Wire Co. v. Speed, 192 U. S. 500 (48: 538) the Court said:

> "In a constitutional sense 'imports' embrace "only goods brought from a foreign country, and "do not include merchandise shipped from one "State to another."

And see Woodruff v. Parham, 8 Wall, 123. In **Brown v. Maryland,** 12 Wheat, 419—cited below by ap-

pellant—an act of that State imposed a license fee of $50 on all importers of **foreign** goods. This was clearly an "impost" on foreign imports and held invalid.

IV.

(1) **The Act does not deprive Plaintiff of Property without Due Process of Law.**

This objection is the ground of the 2d and 4th assignments of error, yet it will be seen from the Record that no mention is made of such objections in the elaborate Petition for Rehearing, including Points and Authorities, filed in the lower Court (Tr. pp. 16-47.) It is difficult to surmise how it might be claimed that Plaintiff in error is deprived of its property if it pay the tax sued for—without due process of law. It was furnished by the State Auditor with the proper forms and notified that a report was required, which report it made under oath and the amount of tax due was fixed by its own report. It was sued in the proper way in the Circuit Court having jurisdiction. It was granted an appeal to the State's highest judicial tribunal, and there patiently heard both on the appeal and petitions for rehearing, and is here to be heard as to its defense to the action, what "due process of law" more than this could be asked. The objection of want of "due process of law" cannot be successfully interposed to an Act unless the act, by its terms or in effect, deprives the person affected by the right to a hearing by some proper tribunal or legal authority. No such fault exists in the Act in question. The same opportunities to be heard and to make defense is afforded under it as is afforded to any tax payer under any tax law of the country.

"The enforced collection of taxes levied for pub-
"lic and lawful purposes does not deprive a person of
"his property without due process of law, if the owner
"is afforded an opportunity to contest the legality
"of all the essential steps." 3 A. and E. Encyclo-
pedia of Law, 717.

The only possible ground upon which to sustain the claim of invalidity under this clause would be that the entire Act is **void.**

If only it be held that the 7th Section is invalid because of discrimination or the like, that does not relieve the plaintiff in error, for the remainder—as will be seen —may be upheld, and as this tax is not claimed of plaintiff in error under that Section he cannot be heard to say that Section might deprive somebody of property without due process of law.

(2) Without conceding that the 7th Section violates any constitutional right, it is suggested that there is abundant authority that part of an act may be held invalid and the remainder upheld. In the quotation **supra** from the Waters-Pierce Oil Co. case, this is plainly indicated. In Cooley Const. Lim. 6th Ed. 213, speaking of the above rule it is said:

"If there be any exceptions to this rule they
"must be of cases only where it is evident, from a
"contemplation of the Statute and of the purposes
"to be accomplished by it, that it would not have
"been passed except as an entirety, and that the gen-
"eral purposes of the Legislature will be defeated if
"it shall be held valid as to some cases and void
"as to others."

Citing Tiernier v. Tinker, 102 U. S. 123.
Packet Co. v. Keokuk, 95 U. S. 80.

In Connolly v. Union Sewer Pipe Co., 184 U. S. 540 (46: 692) this Court said:

"If different sections of a Statute are indepen-
"dent of each other, that which is unconstitutional
"may be disregarded, and valid sections may stand
"and be enforced."
105 U. S. 305 (26: 1044).

V.

ACT DOES NOT VIOLATE, "EQUAL PROTECTION OF THE LAW" CLAUSE.

The 1st and 3d assignments of error relate to the alleged violation of the clause of 14th Amendment guaranteeing the **equal protection of the law"** by reason of the 7th Section of the Act under the construction and meaning given it by plaintiff in error and preliminary to the consideration of this point, attention is again invoked to the proposition discussed **(ante Point 1)** that this Court will adopt the interpretation of the law given it by the Court of Appeals. Of course it is not meant that if the State Court merely hold that an Act, or part of an Act does not violate a given section of the Federal Constitution or a Federal Statute, a party, or this Court is precluded from raising the question, whether it does or not. But where the State Court gives to an Act or Section an interpretation or meaning as to its operation and effect, and by enforcing the law as thus construed—and as the highest State Court is thus bound to construe it—no injury can result to the person complaining. This Court will adopt that construction, and hold that there is no violation of the Federal Constitution.

This is strongly stated by this Court in Mo., Kansas & Pac. R. v. McCann, 174 U. S. 580.

"The contention" (that the Act in question "violated 14th Amendment), "calls on this Court "to disregard the **interpretation**, given to a State "Statute, by the Court of last resort of a State, "and by an adverse construction,—to decide that "the State law is repugnant to the Constitution of "the United States. . . . The elementary rule "is that this Court accepts the **interpretation** of a "Statute of a State affixed to it by the Court of "last resort thereof."

It is said in Petition for Rehearing (Tr. 27) that as the Act requires a tax on the **domestic** manufactured rectified spirits but none on rectified spirits of **foreign** manufacture shipped into Kentucky for sale the domestic manufacture is discriminated against.

But the Kentucky Court of Appeals has interpreted the Act as intending to tax the **business** of rectifying etc., in this State. So the foreigner who only ships into the State and does not engage in the **business** of **rectifying**, etc., is not in the **same class** as the rectifier and, as will be shown, may be taxed differently. And this is the correct interpretation of the Act. It is true the foreign rectifier may ship his product into Kentucky and sell it, but in order to do so he must pay a state license tax of $100 to $300 per year according to the quantity sold. (See Ky. Acts 1906, p. 204-5.) So by the laws of the State the business of **wholesaling** rectified spirits by foreign dealers is regulated by an annual tax, while that of the domestic rectifier is regulated by a tax on the output, and this different classification is legitimate.

By same Act Ib. each domestic wholesale dealer in rectified spirits must pay an annual tax according to amount of sales. The **business** of **selling**, and that of **making**, rectified spirits is separately classified and

taxed both as to the foreign and the domestic seller and maker and there is no unlawful discrimination.

Again Plaintiff in error objects (Tr. 25) that:— "the compounder, rectifier or blender in another State is permitted to ship into this State all the compounded, rectified or blended distilled spirits he may desire and if he does not label it "Kentucky Whiskey" or intend so to label it, after it reaches the State, he is not required to pay any tax whatever to the State . . . and he is thereby enable to undersell the rectifier in Kentucky."

Again it is claimed that there is a discrimination in favor of the manufacture of whiskey by one of our process and against the manufacture by another process."

In answer to the last objection it is submitted that such a view is not founded upon the true intention and meaning of the Act. If the Act imposed a tax upon the **manufacture** of **distilled spirits**, by one process and laid no tax on the **manufacture** of **distilled spirits** by other processes, the criticism might apply. But the Act lays no tax on the **manufacture** of **distilled spirits** at all. It lays a tax only upon the **rectifying, adulterating, blending,** etc. of **distilled** spirits, **already manufactured.** It is strongly contended by the rectifiers that **they do not** manufacture (multiply) liquors, but simply, by a proper process, purify, **rectify** and thus improve the quality of spirits already distilled. If this be so they are not in the same **class** with those who **manufacture** distilled spirits and so may be taxed differently if the legislature so elects.

But the Court of Appeals have said the Act is not aimed to distinguish or discriminate between different methods of production, but to tax those engaged in a **business** entirely distinct from the business of original production.

In answer to the second objection, above stated, it is suggested that although the foreign compounder, etc., may ship into Kentucky rectified whiskey—not to brand it or intending to brand it "Kentucky Whisky," without payment of the tax involved herein, there is no discrimination in his favor. The Kentucky rectifier may rightly brand or label his product with the same "Kentucky". The foreign rectifier cannot, without fraud.

The name "Kentucky" was supposed, by the lawmakers, and is in fact, valuable as connected especially with the production of whiskies.

The Kentucky producer cannot lawfully produce rectified spirits bearing that name unless he pays the tax. Equally—and for the protection of the domestic producer—the foreign rectifier, to have the right to the use of that name, as a label, must pay the same tax. So both belong to the same **class**. The foreigner may import his liquors, but he cannot have the advantage of the brand or label to which the domestic producer is entitled, unless he pays the same tax.

Plaintiff in error misapprehends the intent of the section, when it claims that if whisky rectified in Kentucky and being shipped out of the State, and already bearing the label "Kentucky" must, if shipped back into the State, again pay the tax. It is only when shipped into the State for the **purpose** of being labeled "Kentucky" or (which could not happen if already so branded) having been made elsewhere and shipped into the State it be **thereafter** branded as "Kentucky" product, that the tax is exacted. But however this may be, the plaintiff in error, not being sued for the tax on such ground, cannot complain. The above construction of the 7th Section is evidently that intended by the Legislature.

It may be further suggested, upon this point, that before the institution of this suit the U. S. Congress passed a law June 30, 1906, entitled:

> "An Act for preventing the manufacture, sale "or transportation of adulterated or misbranded, or "poisonous or deleterious foods, drugs, medicines, "and liquors, and for regulating traffic thereon, and "for other purposes."

By Sec. 2. "The shipping into any state or territory or the District of Columbia from any other State or Territory . . . of any article of food or drugs which is adulterated, or **misbranded** . . . is hereby prohibited."

Sec. 8. The term "misbranded" shall apply to all articles of food, etc. . . . which is falsely branded **as to the State, Territory or Country in which it is manufactured or produced."**

This, by the terms of the **title** of the Act clearly includes **"liquors."**

It is submitted whether the 7th Section of the Act in question can, in any event, be condemned because it prohibits the doing of a thing prohibited by the above Act of the Congress.

On the subject of the "equal protection of the law", there is no dispute as to the general rule. If the law of a State makes an unreasonable classification in imposing burdens or discriminates unreasonably between those of the same class, it is invalid. The only trouble is in the application in particular cases. It is as difficult to lay down a definite rule as to fix the exact limitations of **"res gestae."** The question in this case is: Does the Act, by reason of Sec. 7, discriminate so as to deprive any person—or rather the class of persons to which Plaintiff in error belongs, of the equal protection of

the law? It is hoped that, construing the Act as intended, and as interpreted by the Kentucky Courts, it has been shown that it is free from such objection.

A large number of cases have been cited by Plaintiff whre Acts have been condemned for discrimination. A brief reference to some of the leading of those cases, distinguishing them from this, and a citation of some in which Acts apparently as much subject to criticism, as well as a few, laying down the principal rules in such cases, will close this brief.

And first as to the **rule**:—

In Welton v. Missouri, 91 U. S., 278 (23, 820):

> "Equal protection cannot be said to be denied "whenever the law operates alike upon **all persons** "and **property similarly situated.**"

In Soon Hing v. Crowley, 113 U. S., 709 (28, 1147):

> "Legislation limited as to objects or territory "does not inpinge on the Constitutional right of "'equal protection' where all persons, **subject** to it "are treated **alike under like circumstances** and **con-** "**ditions.**"

It is certainly competent for the legislature to determine for the purpose of regulating the making of rectified whisky what acts shall constitute a person, a rectifier, etc.

In Bells Gap R. Co. v. Am. of P., 134 U. S., 232 (33: 892):

> "The provision of the 14th Amendment that "no State shall deny to any person the equal pro- "tection of the laws does not prevent a State from "adjusting its system of taxation in all proper and "reasonable ways, nor compel the States to adopt "an **iron** rule of equal taxation."
>
> "The 14th Amendment intended only that equal "protection and security should be given to all,

"**under like circumstances**, and that no greater bur-
"dens should be laid upon one, than are laid upon
"others **in the same calling** and conditions."

If under the Act it were permitted that foreign rectified spirits might be brought into the State, acquire the name or brand of the State and yet no tax be paid upon it, the domestic maker might have cause to complain because he would be required to pay a tax on his product, while others, enjoying the same advantage as to name or label (the only difference being locality) would be exempt, but where such competition is permitted only upon the payment of the same tax, certainly he cannot complain. The two classes are substantially one. See Barbier v. Connolly, 113 U. S., 27; (28: 932) Walston v. Neven 128 N. S., 578; (32: 544).

CASES CITED BY PLAINTIFF DISTINGUISHED

Yick Wo v. Hopkins, 118 U. S:

"As to Laundries in Wooden Buildings the Ordinance of San Francisco divided the persons into two classes depending on the arbitrary decision of the Board."

Cutting v. Kansas City &c. Co., 183 U. S. 79.

A law of Kansas defining what shall constitute a "public stock-yard in Kansas City held invalid because it applied only to **stock-yards** in **that city.**

Fraser v. McConway & Torley Co., 82 Fed. Rep. 257.

A tax on employers of **foreign** unnaturalized **laborers** of 3 cents per day. **Held invalid.**

Union Co. National Bank v. Ozan Lumber Co., 127 Fed., 206.

Ozan Lumber Co. v. Union National Bank, 145 Fed., 344.

A Statute of Arkansas required all negotiable instruments taken for any patent to machine or patent rights to be printed, **except merchants or dealers who sell patented things in usual course** of business." **Held invalid.**

In Re Grice, 79 Fed. Rep. 627:

A Texas Statute prohibiting all combinations in restriction of competition and trade **exempting** agricultural products and live stock while in the hands of the producer or raiser" (Texas Anti-Trust Stat.) **Held invalid.**

State v. Garbroski 111 Iowa, 496.

An Act (Iowa) fixing Peddlers License "**exempting former U. S. Soldiers** from payment of tax. **Held invalid.**

Welton v. Mo., **supra:**

An Act for a license tax for dealers in goods **not the growth, produce** or **manufacture** of the State and no license for dealers in such goods. **Held invalid.**

Webber v. Virginia, 103 U. S., 344 (26: 565.)

Act requiring a license tax for sale of sewing machines by **non-residents** only. **Held invalid.**

The examination of the cited cases might be extended to greater length, but the foregoing are fair examples. No case is cited bearing any similarity—as to the Act—to the case at bar, therefore no assistance can be rendered by its continuance.

Cases where Statutes have been upheld:—

Bells Gap R. R. Co. v. Com. Pa., **supra.**

"By the laws of Pa. all moneyed securities are "subject to an annual tax of 3 mills on the dollar "of their **actual** value, **except** bonds and **other** securities issued by **corporations,** which are taxed at 3 "mills on the $1.00 of the **nominal** or **par** value."

Held: Not a discrimination which the State is not competent to make, where all **corporate** securities are subject to the same regulation.

Slaughter House Cases, 83 U. S., 504, (21: 394):

An Ordinance of New Orleans provides that all Slaughter Houses, Stock Yards, etc., shall be confined to certain limits, and all animals be slaughtered thereat. Upheld.

American Sugar Ref. Co., v. La. Ann., 179 U. S., 89; (45: 102).

"A Statute inposing a license tax on persons and corporations carrying on the business of refining sugar and molasses, **exempting such planters and farmers grinding and refining their own sugar and molasses, does not** deny other sugar refiners the equal protection of the law."

This seems so like the case at bar, that it must be taken as authority, the difference being that in the case at bar, there does not appear, under any reasonable view of the operation of the Act, any discrimination, while in the case cited there is palpable difference, but the Act operates alike on all of the same class.

In Hays v. Mo., 120 U. S., 6 (30: 578), it is said:

> "**No rule can be formulated** that will cover every "case, but . . . we have said the guaranty of "equal protection of the law **means** that no person "or class of persons shall be denied the same pro- "tection of the laws which is enjoyed by other per- "sons, or other classes **in the same place** and **under** "**like circumstances.**"

Tested by this rule the Act in question ought to be upheld. All **persons engaged** in the **business** or **occupation** of rectifying, adulterating, etc., distilled spirits, producing, as a result of the process, whatever it be,

"single stamp" spirits, in Kentucky are taxed, and this includes all persons engaging, to any extent, in shipping spirits into the State, falsely branded, or to be falsely labeled "Kentucky product" are classed as rectifiers, etc., and these and no others are taxed, none of the class is exempted.

And it is competent under all the cases, for the State thus to provide what acts shall constitute a "rectifier, blender, etc.," if in doing so the regulation is reasonable and proper to prevent fraudulent misbranding so as unfairly to secure the advantage of a name or brand to which, in fair trade, only the domestic producer is entitled.

For other cases holding Acts valid which have seemed to discriminate see:

Mo. Pacific R. Co. v. Mackey, 127 U. S. 205,

Erb v. Morasch, 177 U. S. 584, (44: 897)

Fidelity Mut Life Ins. Co. v. Metler, 185 U. S. 308,

Farmers and Merchants Insurance Co. vs. Dabney, 189 U. S. 301,

Mo., Kansas & T. P. R. Co. v. May, 194 U. S. 267,

Tullis v. Lake Erie & W. R., 175 U. S. 348, (44: 192)

In next to the last case cited the Court (Mr. Justice Holmes) said:

> "Great constitutional provisos must be admin-
> "istered with caution. Some play must be allowed
> "for the joints of the machine; and it must be re-
> "membered that legislatures are ultimate guardians
> "of the liberties and welfare of the people in quite
> as great a degree as the Courts."

In the opinion of the State Court of Appeals the court say similar Acts have been held valid to-wit:—

Iowa—Minneapolis Ry. v. Herrick, 127 U. S. 210.

Kansas—Chicago, Kansas, &c. R. v. Pontius, 157 U. S. 209.

Ohio—Pierce v. Van Dusen, 47 U. S. App. 339.

Kansas—Mo. Pacific v. Mackey, 127 U. S. 205.

An affirmance is respectfully asked.

JAMES S. MORRIS, *Special Counsel.*
JAMES BREATHITT, *Attorney General.*
CHAS. H. MORRIS,
For Defendant in Error.

CITATIONS.

In **Statement.**

Acts 1904, p. 255.

H. A. Thierman Co. v. Com. 97, S. W. 366.

Acts 1906, p. 449.

Civil Code, Ky. Sec. 119.

Point I. Interpretation by St. Ct. Sup. 8 Brf.

Tullis v. Lake Erie &c. R., 175 U. S. 175 (44: 192)

Waters-Pierce Oil Co. v. Texas, 177 U. S. 28 (44: 657).

II. Interstate Com. not involved.

Castillo v. McConnico 168 U. S. 674 (42: 622)

People v. Rensaler & Saratoga R. Co. 15 Wend. (N. Y.) 113; 30 Am. Div. 33.

Clark v. Kansas City, 176 U. S. 114 (44: 392)

Co. Supervisors v. Stanly, 105 U. S. 305 (26: 1044).

Stickrod v. Com. 86 Ky. 285 (5 S. W. 580).

Jones v. Black, 48 Ala. 540.

State v. McNulty, 7 N. D. 169 (75 N. W. 87).

Board of Comrs. v. Reeves, 148 Ind. 467.

Schmitt v. Indianapolis, 168 Ind. 631.

III. Impost on Imports.

Am. Steel & Wire Co. v. Speed, 192 U. S. 500 (48: 538).

Woodruff v. Parham, 8 Wall 123.

Brown v. Maryland, 12 Wheat 419.

IV. Due Process of Law.

(1) 3 Am. & Eng. Encyc. of Law, p. 717.

(2) Part may be invalid.

Cooley Const. Lim. 6th Ed. 213.

Union Sewer Pipe Co. v. Connolly, 184 U. S. 540 (46: 692).

105 U. S. 305 (26: 1044).

V. Equal Protection of Law.

Mo. Kansas & C. R. v. McCann, 174 U. S. 580-86.

Acts 1906 p. 204-5.

Act of Congress June 30, 1906, "Pure Food Law."

Welton v. Mo. 91 U. S. 278 (23: 820)

Soon Hing v. Crowley, 113 U. S. 709 (28: 114)

Bells Gap R. v. Pa., 134 U. S. 232 (33: 892)

Barbier v. Connelly, 113 U. S. 27 (28: 923)

Yick Wo v. Hopkins, 118 U. S. 356 (30: 220).

Cutting v. Kansas City Stock Yards, 183 U. S. 79.

Fraser v. McConway & T. Co., 82 Fed. Rep. 257,

In Re Grice, 79 Fed. Rep. 627,

State v. Garbroski, 11 Ioway, 496,

Webber v. Virginia, 103 U. S. 344, (26: 565).

Slaughter House Cases, 83 U. S. 504 (21: 394)

Am. Sugar Refinery Co. v. L. A. An. 179 U. S. 89 (45: 102)

Mo. P R. Co. v. Mackay, 127 U. S. 205

Erb v. Morasch, 177 U. S. 584 (44: 897).

Fidelity Mut. Life Ins. Co. v. Metler, 185 U. S. 308,

Farmers & Merchants Ins. Co. v. Dobney, 189 U. S. 301,

Tullis v. Lake E. & Western R. R., 175 U. S. 348 (44:192).

Mo. Kansas & T. P. R. Co. v. May, 194 U. S. 267.

BROWN-FORMAN CO. v. COMMONWEALTH OF KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 6. Argued April 11, 12, 1910.—Decided May 16, 1910.

This court accepts the construction by the highest court of the State that the tax imposed by the state statute in this case is not a property tax, but a license tax, imposed on the doing of a business which is subject to the regulating power of the State.

The function of taxation is fundamental to the existence of the governmental power of the States, and the restriction against denial of equal protection of the law does not compel an iron rule of equal taxation, prevent variety in methods, or the exercise of a wide discretion in classification.

A classification which is not capricious or arbitrary and rests upon reasonable consideration of difference or policy does not deny equal protection of the law, and so held that the classification in the Kentucky act of 1906, imposing a license tax on persons compounding, rectifying, adulterating, or blending distilled spirits, is not a denial of equal protection of the law because it discriminates in favor of the distillers and rectifiers of straight distilled spirits.

A State cannot impose an occupation tax on a business conducted outside of the State, and a license tax imposed on those doing a specified business within the State is not unconstitutional as denying equal protection of the law or violating the commerce clause because not imposed on those who carry on the same business beyond the jurisdiction of the State and who ship goods into the State.

While taxation discriminating in favor of residents and domestic products, and against non-residents and foreign products, might be invalid under the commerce clause, that objection does not apply to uniform taxation on a business which does not discriminate in favor of residents or domestic products.

While a state tax on goods which discriminates arbitrarily against the products of that State and in favor of other States denies equal protection of the law, as both classes of goods are within the taxing power of the State, where the license tax for the business of pro-

ducing the product cannot be imposed on the business beyond the State, it is not discriminatory. *State* v. *Hoyt*, 71 Vermont, 59, distinguished.

125 Kentucky, 402, affirmed.

THE facts are stated in the opinion.

Mr. Levi Cooke and *Mr. A. B. Hayes*, with whom *Mr. W. M. Hough* was on the brief, for plaintiff in error:

The act is unconstitutional under the Fourteenth Amendment; under the commerce clause, and under prohibition against imposts upon exports and imports.

On writ of error to review the judgment of the highest court of a State, as against a right claimed under the Federal Constitution, this court is not bound by the state court's construction of the statute. *Scott* v. *McNeal*, 154 U. S. 34; *Huntington* v. *Attrill*, 146 U. S. 657, 683; *Mobile & O. R. Co.* v. *Tennessee*, 153 U. S. 486; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558.

A State may not, by an arbitrary exercise of its taxing function, single out for oppression a particular person or class of persons within its domain, in violation of the Constitution. *McCullough* v. *Maryland*, 4 Wheat. 316; *Santa Clara County* v. *The Southern Pacific R. R. Co.*, 18 Fed. Rep. 385, 398.

While the Fourteenth Amendment was not intended to compel a State to adopt an iron rule of equal taxation, *Adams Express Co.* v. *Ohio*, 165 U. S. 194; it does prevent singling out and subjecting to taxation a class, and in this case the act discriminates against Kentucky rectifiers and blenders included within its provisions, in favor of other classes engaged in similar business.

The tax is a property tax. *Thierman* v. *Commonwealth*, 123 Kentucky, 740. Its prime purpose is revenue, and as a revenue measure, it must, to afford equal protection of the laws, apply equally to all of the general class engaged in the same business.

A license tax upon a sale of goods is in effect a tax upon the goods. *Brown* v. *Maryland*, 12 Wheat. 425; *Welton* v. *Missouri*, 91 U. S. 275; *Brennan* v. *Titusville*, 153 U. S. 289; *Cook* v. *Pennsylvania*, 97 U. S. 566; *Tiernan* v. *Rinker*, 102 U. S. 123; *United States* v. *Mayo*, 26 Fed. Cas. 1231; *United States* v. *James*, 14 Blatchf. 207; *Perry County* v. *Railroad*, 58 Alabama, 546. The act cannot be reasonably construed as a policing of the business, and the only purpose it effects is to secure accurate returns upon the goods handled, similar to what is effected by §§ 3259, 3260, Rev. Stat. U. S., and see *State* v. *Bengsch*, 170 Missouri, 81; *City of Brookfield* v. *Tooey*, 141 Missouri, 619; *Adams Express Co.* v. *Kentucky*, 166 U. S. 171; *Levi* v. *Louisville*, 97 Kentucky, 394, 408.

The tax is discriminatory. There is no inherent distinction between blended and unblended distilled spirits sufficient to justify the classification. The tax discriminates against the distilled spirits attempted to be subjected thereto in favor of the exempted spirits produced in the State as well as similar exempted spirits coming from other States and countries.

As to similar statutes held unconstitutional see *Hinson* v. *Lott*, 8 Wall. 148; *State* v. *Bengsch*, 170 Missouri, 81; *State* v. *Hoyt*, 71 Vermont, 59; *State* v. *Pratt*, 59 Vermont, 590; *State* v. *Montgomery*, 94 Maine, 192.

State measures have been sustained on the ground that they operated with equality both upon domestic goods and goods from other States, in *Kehrer* v. *Stewart*, 197 U. S. 60; *Phillips* v. *Mobile*, 208 U. S. 472; *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 17; *Howe Machine Co.* v. *Gage*, 100 U. S. 676, and see *Darnell* v. *Memphis*, 208 U. S. 113, holding a tax levied upon logs brought into the State of Tennessee from elsewhere invalid, so long as logs cut from lands within the State of Tennessee were exempt as products of the State. The converse of this rule must be equally true, *i. e.*, a tax levied upon the product of a State

is invalid so long as the similar product of other States is exempt within the State.

A State cannot impose burdens in the way of taxation upon goods from other States or countries not imposed upon those produced within its borders, nor can a State impose burdens upon domestic goods not imposed upon those coming within its borders from other States and countries.

In this connection intoxicating liquors, where authorized as legitimate articles of commerce by the public policy of a State, are upon exactly the same plane as any other legitimate articles of commerce, in their relation to the commerce clause of the Constitution. *License Cases*, 5 How. 577; *Bowman* v. *Chicago & N. W. Ry. Co.*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100; *Reid* v. *Colorado*, 187 U. S. 137, 150.

Under the Wilson Act foreign liquors upon their arrival in a State must be subjected to its law the same as though they had been produced within the State.

The act to be valid, should require the placing of the same burden upon spirits brought into the State as upon those produced within its borders. *Scott* v. *Donald*, 165 U. S. 58, 94; *Guy* v. *Baltimore*, 100 U. S. 434; *Welton* v. *Missouri*, 91 U. S. 275.

A State cannot, under the guise of inspection laws, make discriminations against the products of other States in favor of its own, *Voight* v. *Wright*, 141 U. S. 62, and the converse of this proposition must also be true.

While a State may validly, in the exercise of its police power, regulate the manufacture of goods that eventually will go into interstate commerce, and conversely Congress, in its regulation of interstate commerce, cannot control the manufacture of, as distinct from the commerce in, goods that may eventually go into interstate commerce, when a State singles out a particular article on which it places a tax burden as a distinct impost, so

that when that article goes into commerce among the States it inevitably bears such impost as distinct from the general property tax requirements of the State, such impost must be considered as a regulation of commerce. *Kidd* v. *Pearson*, 128 U. S. 1.

The act makes no attempt to prohibit the manufacture of liquors, and as to at least one of the classes of liquors involved, *i. e.*, blended liquors, no act of manufacture is committed. The mere mixing for sale of two whiskies, for instance, cannot be regarded as an act of manufacture. *Hartranft* v. *Wiegmann*, 121 U. S. 609.

The vicious tendency of the tax is that one State takes tribute from a particular article of its production to the manifest injury of interstate commerce in that article.

The prohibition upon the States against placing imposts upon exports is, as to imports, confined to a restriction of the state power as regards imports from foreign countries. *Woodruff* v. *Parham*, 8 Wall. 123. The prohibition as to exports does apply only to exports from a State to a foreign country.

A charge upon passengers leaving the State by stage coach, imposed by a Nevada act, was held unconstitutional under the commerce clause, and as violating the prohibition against state imposts, and on the ground that it imposed a charge upon the passing of stage-coach passengers through the State, and thereby abridged the privileges and immunities of citizens of the United States. *Crandall* v. *Nevada*, 6 Wall. 35; *Cook* v. *Pennsylvania*, 97 U. S. 566.

Mr. James S. Morris, with whom *Mr. James Breathitt*, Attorney General of the State of Kentucky, was on the brief, for defendant in error:

This act does not affect, nor is interstate commerce involved. *Castillo* v. *McConnico*, 168 U. S. 674; *People* v. *Rennsalaer & Saratoga R. Co.*, 15 Wend. (N. Y.) 113; *Clark* v. *Kansas City*, 176 U. S. 114; *Co. Supervisors* v. *Stanly*,

105 U. S. 305; *Stickrod* v. *Commonwealth*, 86 Kentucky, 285; *Jones* v. *Black*, 48 Alabama, 540; *State* v. *McNulty*, 7 N. D. 169; *Board of Comrs.* v. *Reeves*, 148 Indiana, 467; *Schmidtt* v. *Indianapolis*, 168 Indiana, 631.

It does not violate the constitutional prohibition against imposts on imports. *Am. Steel & Wire Co.* v. *Speed*, 192 U. S. 500; *Woodruff* v. *Parham*, 8 Wall. 123; *Brown* v. *Maryland*, 12 Wheat. 419.

It does not deny due process of law. 3 Am. & Eng. Ency. of Law, 717. Part may be invalid. Cooley, Const. Lim., 6th ed., 213; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; 105 U. S. 305.

Nor does it deny equal protection of law. *Mo., Kansas & C. R.* v. *McCann*, 174 U. S. 580–586; Acts, 1906, pp. 204–205; Act of Congress June 30, 1906, "Pure Food Law;" *Welton* v. *Missouri*, 91 U. S. 278; *Soon Hing* v. *Crowley*, 113 U. S. 709; *Bell's Gap Rd.* v. *Pennsylvania*, 134 U. S. 232; *Barbier* v. *Connolly*, 113 U. S. 27; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *Fraser* v. *McConway & T. Co.*, 82 Fed. Rep. 257; *In re Grice*, 79 Fed. Rep. 627; *State* v. *Garbroski*, 11 Iowa, 496; *Webber* v. *Virginia*, 103 U. S. 344; *Slaughter House Cases*, 16 Wall. 504; *Am. Sugar Refinery Co.* v. *L. A. An.*, 179 U. S. 89; *Mo. P. R. Co.* v. *Mackay*, 127 U. S. 205; *Erb* v. *Morasch*, 177 U. S. 584; *Fidelity Mut. Life Ins. Co.* v. *Metler*, 185 U. S. 308; *Farmers' & Merchants' Ins. Co.* v. *Dobney*, 189 U. S. 301; *Tullis* v. *Lake E. & Western R. R.*, 175 U. S. 348; *Mo., Kansas & T. P. R. Co.* v. *May*, 194 U. S. 267.

MR. JUSTICE LURTON delivered the opinion of the court.

The Commonwealth of Kentucky instituted this proceeding to collect an occupation tax imposed by an act of the general assembly of that State of March 26, 1906,

whereby every corporation or person engaged in the State, "in the business or occupation of compounding, rectifying, adulterating or blending distilled spirits," is required to pay "a license tax of one and one-fourth cent upon every wine gallon of such compounded, rectified, blended or adulterated distilled spirits." The defenses presented were, first, that the plaintiff in error had paid the tax due for the rectification of "single stamp spirits," and that the act does not cover "double stamp spirits," used as a basis for its operations; second, that the act was repugnant to the constitution of the State; and, third, that the act is repugnant to the Constitution of the United States, in that it is a regulation of interstate commerce, and operates as a denial of the equal protection of the law. The questions concerning the validity of the act under the state constitution and as to the liability of the plaintiff in error under the act as construed and enforced by the highest court of Kentucky, may be laid on one side, for the only contentions which concern us under this writ of error to the state court are those which arise under the Constitution of the United States.

The two sections of the act which need be examined are the first and seventh, which are set out in the margin.[1]

[1] SEC. 1. Every corporation, association, company, copartnership or individual engaged in this State in the business or occupation of compounding, rectifying, adulterating or blending distilled spirits, known and designated as single stamp spirits, shall pay to the Commonwealth of Kentucky a license tax of one and one-fourth cent upon every wine gallon of such compounded, rectified, blended or adulterated distilled spirits.

SEC. 7. Any corporation, association, company, copartnership or individual who shall ship any compounded, rectified, blended or adulterated distilled spirits, known and designated as single stamp spirits, into this State for the purpose of labeling, branding, marking or stamping the same as Kentucky whiskey, product or spirits or which, before shipment into this State, shall have been, or may thereafter be,

The other sections provide for reports and impose penalties for delinquencies in reporting or paying.

It is said that the seventh section of the act imposes a license tax upon the business of shipping into the State of goods like those made by the plaintiff in error, when deceptively marked or labelled "as Kentucky whiskey," or intended to be so deceptively branded or labelled when received in the State; and that such a burden is illegal as a regulation of interstate commerce. But as plaintiff in error concedes that it is not engaged in bringing into the State spirits deceptively marked as a Kentucky product nor intended to be so branded and has not been proceeded against under that section, it is clear, the section being a separable provision, that we need not deal with either of these objections, save only as the presence of that section in the act may have a bearing upon the question of discrimination between the domestic and foreign product, which is the real question in the case.

The question upon which the case must turn comes to this: Has the State denied to the plaintiff in error the equal protection of the law, guaranteed by the Fourteenth Amendment, by the imposition of the tax provided under the first section of the act? It is urged that that section falls under the condemnation of the provision of the Federal Constitution, because, to quote from the brief of counsel, it "creates an unjust discrimination against

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labeled, branded, marked or stamped as Kentucky whiskey, product or spirits, shall be deemed compounders, rectifiers, blenders or adulterators under the provisions of this act, and shall pay the license tax imposed herein on compounders, rectifiers, blenders or adulterators of such spirits in this State, and shall make the report required herein to the auditor of public accounts. Any corporation, association, company, copartnership or individual who shall violate this section of this act shall be deemed guilty of a misdemeanor, and fined in any sum not less than five hundred nor more than one thousand dollars. Each shipment shall be deemed a separate offense. The Franklin Circuit Court shall have jurisdiction of all offenses committed under this act.

Kentucky rectifiers and blenders included within the provisions of the act, in favor of the three other classes engaged in the same business, to wit: (1) Kentucky distillers who vend unrectified and unblended spirits; (2) distillers of other States, or countries, who vend in Kentucky unrectified and unblended spirits; and (3) rectifiers and blenders of other States, or countries, who vend in Kentucky untaxed rectified or blended spirits, in direct competition with the spirits of Kentucky rectifiers, or blenders, subject to the tax."

It has been urged that the tax is not imposed as a license upon the doing of business, but is laid upon the goods produced, and is therefore arbitrary and discriminatory as one not imposed upon all other like kinds of liquor, whether produced in or out of the State. This contention, if good, would only carry the case back to the underlying objection that the classification is arbitrary and unreasonable, and therefore void, as denying the equal protection of the law, a question which at last must be answered, whether the tax be an occupation or a property tax. But the Kentucky Court of Appeals has construed the act as not a property tax, but as one imposing a license or occupation tax upon the business. Speaking by Judge Hobson, the Kentucky Court of Appeals said: "A license tax is imposed. The amount of the license tax is determined by the amount of the spirits produced. The tax is not upon the spirits. It is a license tax upon the business. To hold it as a tax upon the property, we must disregard the word 'license' in both the title and the body of the act. That a license tax was contemplated is also shown by § 3, which requires that notice shall be given to the auditor, stating certain facts, before the business shall be engaged in; by § 4, that upon such notice the auditor shall thereupon issue to each applicant a certificate showing that he has complied with the act, and by § 5, that upon the payment of the license tax to the

treasurer the auditor shall issue to such persons authority to continue in the business, if such authority is desired. Under the statute a man may not legally engage in the business without giving notice and having the certificate from the auditor. The payment of the tax at the times required by the statute is the condition upon which authority to continue in the business is made to depend. This is manifestly a tax on the business and not upon the property. The amount of the tax is simply regulated by the amount of the product, but it is a license tax upon the business. To hold otherwise would be to say that the legislature cannot impose a graduated license tax based upon the amount of product manufactured." Such a construction and interpretation of the statute here involved, by the highest court of the State, should be accepted as definitely determining that the tax complained of is not a property tax, but a license tax imposed upon the doing of a particular business plainly subject to the regulating power of the State.

We come then to the question as to whether this act makes an arbitrary and illegal discrimination in favor of other persons or corporations engaged in the same business. The question is at last one of classification of subjects, trades or pursuits for the purpose of taxation, and concerns the power of the States to exercise discretion in the methods, subjects and rates of taxation. Fundamental to the very existence of the governmental power of the States as is this function of taxation, it is nevertheless subject to the beneficent restriction that it shall not be so exercised as to deny to any the equal protection of the law. But this restriction does not compel the adoption of "an iron rule of equal taxation," nor prevent variety in methods of taxation or discretion in the selection of subjects, or classification for purposes of taxation of either properties, businesses, trades, callings or occupations. This much has been over and over announced by this court.

Bell's Gap Rd. v. *Pennsylvania*, 134 U. S. 232; *Cargill Co.* v. *Minnesota*, 180 U. S. 452; *Missouri, Kansas and Texas Railway Co.* v. *May*, 194 U. S. 267; *Cook* v. *Marshall County*, 196 U. S. 268; *Williams* v. *Arkansas*, 217 U. S. 79; *Southwestern Oil Co.* v. *State of Texas*, 217 U. S. 114.

The answer of the plaintiff in error concedes that it is "doing business in this State and engaged in the business or occupation of compounding, rectifying, adulterating or blending distilled spirits, known and designated as single stamp spirits." Plaintiff in error now says that it has been arbitrarily singled out and its business or occupation taxed, thereby discriminating in favor of "three other classes engaged in the same business." The first class which is named as favored are distillers who neither rectify, compound, adulterate nor blend their products. Manifestly there is nothing capricious in putting the occupation carried on by the plaintiff in error in a class distinct from that of the whiskey distillers whose straight product is the basis for the manipulated product of those engaged in the taxed business. A very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law. The reasons for discriminating between distillers and rectifiers is not obscure, and a classification which includes one and omits the other is by no means arbitrary or unreasonable. In *American Sugar Ref. Co.* v. *Louisiana*, cited above, a license tax imposed upon the business of refining sugar and molasses was sustained, although planters grinding and refining their own sugar were excluded. In *Cargill Co.* v. *Minnesota*, 180 U. S. 452, 469, a state statute requiring elevator com-

panies operating elevators situated upon railway rights of way to take out a license, without requiring those not so situated to do so, was held not to be an illegal discrimination. This court there said, in reference to the insistence that the discrimination was a denial of the equal protection of the law, that "No such judgment could be properly rendered unless the classification was merely arbitrary or was devoid of those elements which are inherent in the distinction implied in classification. We cannot perceive that the requirement of a license is not based upon some reasonable ground—some difference that bears a proper relation to the classification made by the statute." In *Williams* v. *State of Arkansas*, cited above, a classification in a state statute which prohibited drumming on trains for business for any hotel, lodging house, bath house, physicians, etc., was sustained as not a capricious classification, although it did not apply to drumming for other business not mentioned, but distinguishable by reason of local conditions. In *Southwestern Oil Co.* v. *State of Texas*, 217 U. S. 114, it was held that an occupation tax on all wholesale dealers in certain articles did not deny to the class taxed the equal protection of the law because a similar occupation tax was not imposed on wholesale dealers in other articles.

It is next said that "distillers of other States and countries, who vend in Kentucky unrectified and unblended spirits," are untouched by the law. This is answered by what we have said as to such distillers manufacturing within the State, as well as by the obviousness of the fact that the State of Kentucky had no more right to impose an occupation tax upon a business conducted outside of the State than it had to lay a property tax upon property outside of the State.

Finally, it is said that "rectifiers and blenders of other States or countries who vend in Kentucky untaxed rectified or blended spirits, in direct competition with the

spirits of Kentucky rectifiers, or blenders, are not subject to the tax."

The contention comes to this: A State may not impose a tax upon the privilege of carrying on a particular business or occupation in the State, unless it can impose a similar tax upon the same business or occupation carried on outside of the State, if the latter may, through interstate commerce, compete by shipments into the State with the product of the taxed resident. A system of taxation discriminating in favor of residents and domestic products and against non-residents and foreign products might result in commercial non-intercourse between the States, and as a regulation of interstate commerce would clearly be invalid. The objection, however, would not apply to a uniform tax upon goods which does not discriminate in favor of residents or products of the State. *Woodruff* v. *Parham*, 8 Wall. 123; *Hinson* v. *Lott*, 8 Wall. 148; *Emert* v. *Missouri*, 156 U. S. 296.

There is no pretense here that there has been any discrimination in favor of either the residents or the products of Kentucky, but the reverse, in that the resident rectifier is discriminated against because the product of the untaxed non-resident rectifier meets those of the taxed rectifier in competition for the trade of Kentucky. But counsel say that discrimination against residents or products of the State is as much a denial of the equal protection of the law as any other method of unequal taxation, and cite *State* v. *Hoyt*, 71 Vermont, 59, 64. That was a case involving the validity of a license tax by the State of Vermont upon peddlers of goods, "*the manufacture of this State.*" The Vermont court held that when a business consists in selling goods the exaction of a license for its pursuit was in effect a tax upon the goods themselves, and that as this tax discriminated arbitrarily against the products of the State, it was void as denying the equal protection of the law. But the ground of

the decision was that the discrimination against the goods of the State and in favor of the products of other States, both classes of goods being within and subject to the taxing power of the State, was an illegal discrimination, as arbitrary and capricious. The court said:

"The question, therefore, is one of classification. If, in the case supposed, the resident and the non-resident manufacturer or their goods can be differently classed, the statute can be sustained; otherwise not. The rule on this subject is, that the mere fact of classification is not enough to exempt a statute from the operation of the equality clause of said amendment, but that in all cases it must appear, not only that a classification has been made, but that it is one based on some reasonable ground, some difference that bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. *Gulf, Colorado & Santa Fe R. R. Co.* v. *Ellis*, 165 U. S. 150."

The case has no bearing upon the present case. In that case the license might have been exacted from one peddling in Vermont, whether he peddled domestic or foreign goods. Here the exaction is not upon the product at all, but upon the business of producing the product in the State. The same business carried on beyond the State could not have been subjected to a like tax. There has therefore been no arbitrary or capricious discrimination against the resident rectifier.

There is no error in the judgment, and it is

Affirmed.